Timothy J. Ma...
11 Gates St.,
So. Boston,
Mass.
Boston University Law School

T. J. MULCAHY
Captain, Q.M.C.
Assistant

Digitized by the Internet Archive
in 2025

https://archive.org/details/lawofagency0000erne

THE LAW OF AGENCY

THE LAW OF AGENCY

INCLUDING

THE LAW OF PRINCIPAL AND AGENT

AND

THE LAW OF MASTER AND SERVANT

BY

ERNEST W. HUFFCUT

PROFESSOR OF LAW IN THE CORNELL UNIVERSITY
COLLEGE OF LAW

SECOND EDITION

REVISED AND ENLARGED

BOSTON
LITTLE, BROWN, AND COMPANY
1901

Copyright, 1895, 1901.
By Ernest W Huffcut

PREFACE TO THE SECOND EDITION.

THE primary purpose of this volume is to set forth the manner in which obligations are incurred or rights acquired through the acts of agents and servants, and to do this as a natural sequence to a study of the manner in which like obligations are incurred or like rights acquired by one's own acts. Book I. deals with the law of Principal and Agent; that is, the law of agency in its application to the creation of primary obligations, mainly those of contract. Book II. deals with the law of Master and Servant; that is, the law of agency in its application to the creation of secondary or substituted obligations, mainly those in tort. Book I. may therefore properly supplement a study of the law of contract, and Book II. a study of the law of tort. Book I. is largely rewritten, and Book II. appears for the first time in this edition: the whole constitutes practically a new work.

An attempt has been made in the Introduction to state clearly the distinction between an agent and a servant, and the legal consequences that flow from such a distinction. This is more fully developed in the sections dealing with the liability of a principal or a master for acts of the agent or servant in excess of the authority. It is believed that this distinction is not merely a theoretically valid one, but that it is a necessary means to the correct solution of the problem of the constituent's liability, especially in the case of an agent's frauds, and that the failure to observe it has led to needless confusion.

While no attempt has been made to cite all decided cases in agency in all of the fifty or more jurisdictions from which authorities may be gathered, there has been a painstaking

effort to cite an adequate number of authoritative and well-reasoned cases, and upon all controverted questions to make the citations as full as the scope of the work would permit.

In its enlarged form this work covers the whole field of agency, and, it is hoped, may prove useful not only to the student but also to the practitioner.

E. W. H.

Cornell University College of Law,
August, 1901.

TABLE OF CONTENTS.

Book I.

PRINCIPAL AND AGENT.

INTRODUCTION.

CHAPTER I.

PRELIMINARY TOPICS.

Section		Page
1.	Representation in the law of obligation	3
2.	Meaning and scope of agency	5
3.	Distinction between agency and other legal relations	6
4.	Distinction between the law of principal and agent, and the law of master and servant	10
5.	Basis of constituent's liability for the acts of his representative	13
6.	Definition of agent and servant	17
7.	Classification of agents and servants	19
8.	Divisions of the subject of agency	21

PART I.

FORMATION OF THE RELATION OF PRINCIPAL AND AGENT.

CHAPTER II.

FORMATION OF THE RELATION BY AGREEMENT.

10.	Elements of agreement	24

1. *Agency by Contract.*

11.	Elements of contract	25
12.	Forms of agreement	25

Section Page
13. Consideration 26
14. Parties — Competency 27
15. — Infant principal 27
16. — Insane principal 28
17. — Married women as principals 30
18. — Corporations as principals 31
19. — Partnerships as principals 32
20. — Unincorporated clubs as principals 32
21. — Aliens as principals 33
22. — Joint principals 33
23. — Competency of agents 34
24. — Joint agents 35
25. — Sub-agents 36
26. Form of contract 36
27. Legality of object 39

2. *Gratuitous Agents.*

28. As between agent and third party 40
29. As between principal and agent 40

CHAPTER III.

FORMATION OF THE RELATION BY RATIFICATION.

30. Meaning of ratification 42

1. *Elements of Ratification.*

31. Analysis 43
32. Act in behalf of existing principal 43
33. Assent of principal 46
34. Assent may be express or implied 47
35. Assent by silence 49
36. Assent must be in toto and unconditional 50
37. Assent must be free from mistake or fraud 50
38. Assent: has third party a right to recede before assent of principal 52
39. Competency of principal 53
40. Form of ratification 55
41. Legality or validity of act: general rule 56
42. Same: exceptions to rule 57
43. Same: converse of rule 58
44. Same; ratification of forgery 58

2. *Legal Effects of Ratification.*

Section Page
45. Ratification is irrevocable 59
46. Effect as between principal and third party 59
47. Effect as between principal and strangers 60
48. Effect as between principal and agent 60
49. Effect as between agent and third party 61

CHAPTER IV.

FORMATION OF THE RELATION BY ESTOPPEL.

50. Agencies not resting on assent 62
51. Meaning of estoppel 62
52. Application to law of agency 64
52 *a*. Application to agent's torts 68
53. Limits of the doctrine 70

CHAPTER V.

FORMATION OF THE RELATION BY NECESSITY.

54. General doctrine of contracts from necessity 72
55. Agency of wife 72
56. Agency of infant child in purchase of necessaries 74
57. Agency of shipmaster 74
58. Agency of unpaid vendor 75
59. Other illustrations 75

CHAPTER VI.

TERMINATION OF THE RELATION.

60. Ways in which relation may be terminated 77

1. *By Bilateral Act.*

61. By terms of original agreement 77
62. By subsequent agreement 78

2. *By Unilateral Act.*

63–68. Revocation 78
69. Renunciation 82

3. *By Operation of Law.*

Section Page
70. By change affecting subject-matter 82
71. By change in condition of parties 84

4. *Irrevocable Agencies.*

72. Doctrine of irrevocable agencies 87

PART II.

LEGAL EFFECT OF THE RELATION AS BETWEEN PRINCIPAL AND AGENT.

CHAPTER VII.

OBLIGATIONS OF PRINCIPAL TO AGENT.

75–83. Compensation of agent 92
84. Reimbursement of agent 103
85. Indemnity to agent 104
86. Non-assignability of obligations 105

CHAPTER VIII.

OBLIGATIONS OF AGENT TO PRINCIPAL.

1. *Agents by Contract.*

88. Obedience 106
89. Prudence 108
90. Good faith 110
91. Accounting 112
92–95. Acting in person: appointment of sub-agents 115
96. Del credere agents 120

2. *Gratuitous Agents.*

97. Obligations of gratuitous agents 122
98. Gratuitous bank directors 124

PART III.

LEGAL EFFECT OF THE RELATION AS BETWEEN THE PRINCIPAL AND THIRD PARTIES.

CHAPTER IX.

CONTRACT OF AGENT IN BEHALF OF A DISCLOSED PRINCIPAL.

1. *In Agencies Generally.*

Section		Page
100.	General doctrine	127
101.	Contracts actually authorized	128
102.	Contracts apparently authorized: estoppel	128
103.	Ostensible authority: meaning	129
104.	Same: general and special agents	132
105.	Same: public agents	134
106.	Same: elements of authority	135
107.	Same: illustrations	140
108.	Contracts unauthorized	147
109.	Contracts voidable	148

2. *In Particular Agencies.*

111.	Factors	149
112.	Brokers	151
113.	Auctioneers	153
114.	Attorneys at law	154
115.	Bank cashiers	155
116.	Shipmasters	156

CHAPTER X.

CONTRACT OF AGENT IN BEHALF OF UNDISCLOSED PRINCIPAL.

1. *The Doctrine of Privity of Contract.*

118.	General statement of the doctrine	158
119.	Application to agency generally	160
120.	Application to contract for undisclosed principal	160
121.	Suits against undisclosed principal	162
122.	Suits by undisclosed principal	164
123.	Parol evidence rule	164

2. *Liability of an Undisclosed Principal.*

Section — Page
124. General rule 166
125–128. Exceptions 167

3. *Rights of an Undisclosed Principal.*

129. General rule 172
130–135. Exceptions 173

CHAPTER XI.

ADMISSIONS AND DECLARATIONS OF AGENT.

136. Object in proving admissions 178
137. When always inadmissible 178
138. When admissible: general rule 180
139. When admissible: res gestæ 180
140. Limitation of rule: adverse interest 185

CHAPTER XII.

NOTICE TO AGENT.

141. General statement of rule 186
142. Notice acquired during transaction 187
143. Notice outside of transaction, but within general scope of agency 187
144. Notice before agency begins 188
145. General qualifications 189
146. Application of rule to corporations 190
147. Notice to sub-agent 191

CHAPTER XIII.

LIABILITY OF PRINCIPAL FOR TORTS OF AGENT.

1. *Liability for Torts Generally.*

148. Distinction between servant's torts and agent's torts 193
149. Basis of master's and of principal's liability for tort 194
150. Nature of third person's remedies 196

2. *Liability for Frauds and Misrepresentations of Agent.*

151. Fraud and misrepresentation generally 197
152. Fraud in relation to agency: deceit 197
153. Fraud for benefit of principal 200
154. Fraud for benefit of agent 202

Section Page
155. Fraud — Issue of fictitious stock certificates 204
156. — Issue of fictitious bills of lading 206
157. — Other illustrations 207

3. *Liability for Influencing Conduct of Other Persons.*

158. Representations about plaintiff 208
159. Inducing breach or termination of contract 209
160. Defamation 209
161. False arrest and malicious prosecution 210

CHAPTER XIV.

LIABILITY OF THIRD PERSON TO PRINCIPAL.

1. *Contract Obligations.*

163. Contracts by agent 212
164. Contracts in name of principal 212
165. Contracts in name of agent 213

2. *Quasi-Contract Obligations.*

166. Money paid by mistake 214
167. Money paid under duress or fraud 215

3. *Tort Obligations.*

168. Property diverted by agent: general rule 216
169. Exceptions: negotiable instruments 217
170. Exceptions: indicia of ownership 217
171. Exceptions: factors acts 219
172. Forms of action for property or its value 222
173. Wrongs of fraud and malice 223
174. Fraud in making contract 223
175. Collusive fraud 223
176. Interference with agency 224

4. *Trust Obligations.*

177. Constructive trusts 225
178. Following trust funds 225
179. Legal remedies for diversion of trust funds 227

PART IV.

LEGAL EFFECT OF THE RELATION AS BETWEEN THE AGENT AND THIRD PARTIES.

CHAPTER XV.

CONTRACT RELATIONS BETWEEN AGENT AND THIRD PARTY.

1. *Where Principal alone is Bound.*

Section		Page
182.	Authorized contract	229

2. *Where Agent alone is Bound.*

183.	Unauthorized contract	230
184.	Incompetent principal	233
185.	Fictitious principal	233
186.	Exclusive credit to agent	235
187.	Foreign principal	236
188.	Contract under seal	237
189–195.	Negotiable instruments: construction of signatures	238

3. *Where both Principal and Agent are Bound.*

196.	Undisclosed principal	249
197.	Simple contract signed by agent	250
198.	Effect of custom	252
199.	Interest in subject-matter	253

4. *Where neither Principal nor Agent is Bound.*

200.	Revocation of authority by death	253
201.	Disclosure of facts affecting authority	254
202.	Insufficiency of form	254

5. *Special Case of Public Agents.*

203.	Public agents	254

6. *Liability of Agent in Quasi-Contract.*

204.	Money paid agent by mistake or fraud	255
205.	Money received to use of third party	257

7. *Liability of Third Person to Agent.*

Section Page
207. Where agent alone may sue 258
208–209. Where either principal or agent may sue 260
210. Liability in quasi-contract 262

CHAPTER XVI.

TORTS BETWEEN AGENT AND THIRD PARTY.

211. Agent liable for misfeasance 263
212. Whether liable for non-feasance 263
213. Special instances of misfeasance 264
214. Whether principal and agent liable jointly 266
215. Liability of third person to agent for torts 267

Book II.

MASTER AND SERVANT.

INTRODUCTION.

216. Scope of the subject of master and servant 271

PART I.

WHO IS A SERVANT?

CHAPTER XVII.

INDEPENDENT CONTRACTORS.

218. General rule 274
219. Exceptions — Selecting competent contractor 275
220. — Contracting for nuisance 275
221. — Contracting for unsafe result 276
222. — Statutory liability to construct safely 276
223. — Contract liability to construct safely 277
224. — Extra-hazardous work 277

Section Page
225. Exceptions — Safety of premises 278
226. — Interference by employer 278
227. Resumption of control by owner 279

CHAPTER XVIII.

TRANSFER OF SERVICE.

228. General rule 280
229. Hiring horses and driver 280
230. Hiring machine and operator 283
231. Servant sent to work on another's premises 284
232. Physician employed for benefit of servants or passengers . . . 284
233. Sleeping-car porters also servants of railroad company 285

CHAPTER XIX.

COMPULSORY EMPLOYMENT OR SERVICE.

234. Meaning 286
235. Liability for servant compulsorily employed 286
236. Status of one compelled to serve 288
237. Parent and child 289
238. Husband and wife 289

CHAPTER XX.

SUB-SERVANTS AND VOLUNTEERS.

239. Sub-servants 291
240. Volunteers 292

PART II.

LIABILITY OF MASTER FOR TORTS AND CRIMES OF SERVANT.

CHAPTER XXI.

LIABILITY OF MASTER TO THIRD PERSONS FOR TORTS OF SERVANT.

242. Conditions of liability 295
243. Wrongdoer must be defendant's servant 295
244. Servant must be about his master's business 297
245. Servant must be acting within the course of his employment . . 298

Section Page
246. Same: acts commanded by master 299
247. Same: acts ratified by master 300
248. Same: acts which master reasonably led servant to believe were authorized 301
249. Same: acts impliedly authorized 302
250. Same: acts for master's benefit 304
251. Same: acts for servant's benefit 305
252. Wilful or malicious torts: (1) in furtherance of the employment . 305
253. Same: (2) injuries to passengers 310
254. Same: (3) misuse of dangerous instrumentalities 311
255. Liability of master for exemplary damages 313
256. Imputed notice 314

CHAPTER XXII.

LIABILITY OF PUBLIC AGENCIES OR PUBLIC CHARITIES FOR TORTS OF SERVANTS.

257. General doctrine 315
258. Liability of the state and its agencies 315
259. Liability of municipal corporations 316
260. Liability of public officer 317
261. Liability of public charity 318
262. Liability of private person served by public officer 321

CHAPTER XXIII.

LIABILITY OF MASTER FOR PENALTIES AND CRIMES.

263. Introductory 322
264. Liability to private penalties 322
265. Criminal liability generally 323
266. Absolute liability 324
267. Authorized crimes 327
268. Negligent failure to control 328

PART III.

LIABILITY OF MASTER FOR INJURIES TO SERVANT.

CHAPTER XXIV.

LIABILITY OF MASTER TO ONE SERVANT FOR TORTS OF ANOTHER SERVANT.

270. Classification of servants 330
271. The fellow-servant rule 331

Section Page
272. Evolution of the rule 332
273. Fellow-servants employed in the same common service 335
274. First exception: the vice-principal doctrine 338
275. Same: the superior officer test 339
276. Same: the non-assignable duty test 340
277. Same: summary of vice-principal doctrine 344
278. Second exception: incompetent fellow-servants 344
279. Third exception: Statutory provisions 345

CHAPTER XXV.

LIABILITY OF MASTER TO SERVANTS FOR HIS OWN TORTS.

280. Introductory 350
281. Negligent operative act 350
282. Negligent performance of non-assignable duties 351
283. Servant's assumption of risks 352
284. Servant's contributory negligence 356
285. Wilful torts 357

PART IV.

LIABILITY OF SERVANT FOR TORTS.

CHAPTER XXVI.

SERVANT'S LIABILITY FOR TORTS.

1. *Liability to Master.*

287. Gratuitous service 360
288. Paid service 360

2. *Liability to Fellow-Servants.*

289. Liable to co-servant for misfeasance 361

3. *Liability to Third Persons.*

290. Liable for misfeasance, but not for non-feasance 362
291. Meaning of non-feasance 362
292. Misfeasance 365
293. Liability for torts of fellow-servants 365
294. Public servants: acts of state 366

PART V.

LIABILITY OF THIRD PERSON FOR TORTS TO MASTER OR SERVANT.

CHAPTER XXVII.

LIABILITY OF THIRD PERSON FOR TORTS.

Section		Page
296.	Personal injuries to servant	368
297.	Seduction of servant	369
298.	Enticing away a servant	370
299.	Procuring discharge or non-employment of servant	372
300.	Summary as to interference with contract relations	373

APPENDIX.

New York Factors Act 375
English Factors Act 377
Massachusetts Employers' Liability Act 381

INDEX 385

CASES CITED

A.

Page

Abbey *v.* Chase 254
Abbott *v.* Abbott 290
v. Hapgood 44
Abel *v.* Delaware & H. C. Co. 341, 352
v. Sutton 138
Abrahams *v.* Bullock 281
v. Deakin 210, 308, 309
v. Kidney 369
Abrath *v.* Northwestern Ry. 211
Ackert *v.* Barker 103
Adams *v.* Flanagan 146
v. Freeman 300
v. Ins. Co. 139
v. Irving Nat. Bank 201
v. Power 56
v. Robinson 107
Adams Mining Co. *v.* Senter 101
Adamson *v.* Jarvis 104
Addison *v.* Gandasequi 169, 235
Ætna N. B. *v.* Ins. Co. 146
Aggs *v.* Nicholson 244
Agnes Otto, The 287
Ahern *v.* Baker 77
v. Goodspeed 140, 141
Alabama, etc., R. *v.* Hawk 184
Albany, etc., Co. *v.* Lundberg 261
Albro *v.* Jaquith 361
Alcorn's Exec. *v.* Cook 38
Aldrich *v.* Boston & Worcester R. 298
Aldridge *v.* Stuyvesant 372
Alexander *v.* Jones 50
v. Southey 265
v. University 101
Alie *v.* Nadeau 97
Allan *v.* State Steamship Co. 285
Allen *v.* Bryson 26, 95
v. Colliery Engineer's Co. 96, 97

Page

Allen *v.* Flood 209, 267, 372, 373
v. Hartfield 264
v. London, etc., Ry. 303, 309
v. McKibbin 100
v. Merchants' Bank 109, 119
v. Miller 244
v. News Pub. Co. 209
v. Railway Co. 310
v. St. Louis Bank 219
v. South Boston R. 190, 206
v. Suydam 109
Allkins *v.* Jupe 103, 104
Althorf *v.* Wolfe 291, 292
Alton *v.* Midland Ry. 368
American Wire and Nail Co. *v.* Bayless 206
Ames *v.* Union Ry. Co. 224, 368
Ancona *v.* Marks 48, 213
Anderson *v.* Boyer 283
v. Ogden, etc. Co. 340
v. Sanderson 182
v. State 327
Andres *v.* Wells 309
Andrews *v.* Ætna Life Ins. Co. 52
v. Green 307
Angel *v.* Felton 290
Angle *v.* Chicago, etc. Ry. 209, 224, 372
Anon. *v.* Harrison 81
Anonymous (12 Mod. 514 (1701)) 67
Appeal of Kisterbock 206
Appleton *v.* Binks 237
Arey *v.* Hall 138
Arff *v.* Star Fire Ins. Co. 118, 192
Argersinger *v.* Macnaughton 141, 150, 249
Arkansas Smelting Co. *v.* Belden Mining Co. 117, 159
Armitage *v.* Widoe 28, 53, 55, 58
Armour *v.* Mich. Cent. R. 195, 207

	Page
Armstrong *v.* Oregon, etc. R.	334, 336, 340
v. State Ins. Co.	144
v. Stokes	168
v. Toler	39
Arnold *v.* Hart	63
v. Poole	39
v. Swenson	248
Arthur *v.* Barton	157
Ash *v.* Guie	32, 234
Ashley *v.* Dixon	372
Ashton *v.* Spiers	309
Ashworth *v.* Stanwix	350
Atchison, etc. R. *v.* McKee	336
v. Zeiler	284
Atkinson *v.* Cotesworth	261
Atkyns *v.* Amber	262
Atlanta R. Co. *v.* Kimberly	274, 279
Atlantic, etc. R. *v.* Dunn	314
Atlas S.S. Co. *v.* Colombian Land Co.	235
Atlee *v.* Bartholomew	53
Attorney-General *v.* Riddle	328
v. Siddon	328
Attwood *v.* Munnings	136
Audenried *v.* Betteley	86
August, The	157
Aultman *v.* Lee	146
Austin *v.* Guardians of Bethnal Green	39
Austrian *v.* Springer	140
Auty *v.* Hutchinson	255
Ayer *v.* Tilden	216
Ayrault *v.* Pacific Bank	120

B.

	Page
Babcock *v.* Beman	247
Bailey *v.* Rome, etc. R.	341
v. Troy, etc. Co.	9
Bain *v.* Brown	110
Baines *v.* Ewing	132, 133, 136, 144, 147
Baird *v.* Shipman	264, 364, 365
Baker *v.* Dinsmore	216
v. Morris	289
v. New York N. B.	226
Balderston *v.* Rubber Co.	121
Baldwin *v.* Bank	177, 248
Baldwin Bros. *v.* Potter	112, 113
Ball *v.* Bruce	371
Ballou *v.* Talbot	231, 241
Baltimore, etc. R. *v.* Pierce	308
Baltzen *v.* Nicolay	231, 232, 233
Bank *v.* American Dock & Trust Co	190, 204, 206, 207
v. Bossieux	124
v. Butler	120
v. Cook	241, 242
v. Cushman	191
v. Monteath	243
v. Owston	210
v. Patterson	39
v. R.	70
v. Town	36
v. Vanderhorst	216
Bank of Batavia *v.* New York, etc. R.	68, 195, 203, 207
Bank of Beloit *v.* Beale	48
Bank of Genesee *v.* Patchin	248
Bank of New York *v.* Bank of Ohio	248
Bank of Owensborough *v.* Western Bank	61
Bank of Palo Alto *v.* Pacific Postal Tel. Cable Co.	207
Bank of the State *v.* Wheeler	248
Banner Tobacco Co. *v.* Jenison	143
Bannon *v.* Warfield	109
Barber *v.* Taylor	107
Bard *v.* Yohn	297
Barden *v.* Felch	300
Barham *v.* Bell	172, 237
Baring *v.* Clark	182
v. Corrie	94, 150, 152
Barker *v.* Furlong	265
v. St. Louis, etc. R.	184
Barlow *v.* Congregational Society	239, 244
Barnard *v.* Coffin	117, 120
Barnes *v.* Ontario Bk.	138, 156
v. Trenton Gas Light Co.	190
Barnett *v.* South London Tram. Co.	180
Barnstable, The	288
Baron *v.* Husband	257
Barrett *v.* Deere	145
Barron *v.* Detroit	317
Barrows *v.* Cushway	82
Barry *v.* Page	236, 237
Bartholemew *v.* Jackson	26, 94

	Page
Bartlett *v.* Tucker	234
Bartley *v.* Richtmyer	369
Barton *v.* Moss	111
Bartonshill Coal Co. *v.* Reid	332
Barwick *v.* English Joint Stock Co.	195, 199, 200, 203, 305
Bates *v.* American Mortgage Co.	192
v. Pilling	263
v. Westborough	317
Batty *v.* Carswell	127, 146
Baulec *v.* N. Y., etc. R.	345
Bawden *v.* London, etc. Co.	187
Baxter *v.* Sherman	174
Bayley *v.* Wilkins	142
Beach *v.* Ficke	257
Beal *v.* South Devon Ry.	108, 122
Bean *v.* Pioneer Mining Co.	171, 242
Beardslee *v.* Richardson	122
Beattie *v.* Lord Ebury	254
Beaufort *v.* Neeld	137
Beckham *v.* Drake	237
Beecher *v.* Venn	142
Belfield *v.* National Supply Co.	174
Bell *v.* Josselyn	362, 363, 365
v. McConnell	101, 102
Bell's Gap R. R. *v.* Christy	44
Benjamin *v.* Dockham	73
Bennett *v.* Allcott	369
v. Bates	266
v. Davis	28
v. Judson	201
v. Lathrop	235
Benson *v.* Liggett	48
Bentley *v.* Doggett	127, 132, 137
Benton *v.* Pratt	372
v. Trustees	320
Benzing *v.* Steinway	352
Berea Stone Co. *v.* Kraft	339, 343, 344
Berg *v.* Parsons	275, 278, 279
Bergh *v.* Warner	73
Bergman *v.* Hendrickson	308, 311
Berkeley *v.* Hardy	37, 258
Berkey *v.* Judd	238
Bernshouse *v.* Abbott	173
Berry *v.* Barnes	142
Betteley *v.* Reed	112
Bexwell *v.* Christie	107
Beymer *v.* Bonsall	169
Bibb *v.* Allen	104
Bickerton *v.* Burrell	259, 260
Bickford *v.* Menier	66, 138, 143
Biddle *v.* Bond	112
Bierce *v.* Red Bluff Hotel Co.	187
Bigelow *v.* Livingston	136
Biggs *v.* Evans	8, 65, 218, 219
Bigley *v.* Williams	183
Billings *v.* Mason	50
Bird *v.* Boulter	35
v. Brown	58, 60
Bittle *v.* Camden & Atl. R.	312
Bixby *v.* Dunlap	370
v. Moor	103
Black *v.* Christchurch Finance Co.	277
Blackburn *v.* Haslam	187
v. Scholes	78
v. Vigors	187
Blackstone *v.* Buttermore	79, 89
Blackwell *v.* Ketcham	132, 146
Blades *v.* Free	84, 253
Blaisdell *v.* Ahern	103
Blake *v.* Ferris	274, 277, 278
v. Lanyon	370
Blakely *v.* Bennecke	234
Blanchard *v.* Kaull	244
Bliven *v.* Hudson River Rd. Co.	112
Bliss *v.* Sneath	258
Blood *v.* French	153
Blore *v.* Sutton	115
Blumenthal *v.* Shaw	209, 358, 373
Board *v.* Howell	36
Bock *v.* Gorrisen	94
Bodge *v.* Hughes	323
Bodine *v.* Killeen	31
Bollman *v.* Loomis	39
Bolton Partners *v.* Lambert	52
Bonaparte *v.* Wiseman	277
Bond *v.* Evans	325, 326
Bonito *v.* Mosquera	221
Bonney *v.* Morrell	155
Bonynge *v.* Field	230
Boorman *v.* Brown	139, 152
Booth *v.* Mister	292
Borcherling *v.* Katz	170, 237
Borden *v.* Boardman	159
Borries *v.* Imperial Ottoman Bank	173, 174
Boston *v.* Simmons	223
Boston Ice Co. *v.* Potter	45, 158, 159, 175, 260
Boston, etc. R. *v.* Whitcher	250
Boswell *v.* Barnhart	289
v. Cunningham	110

	Page
Boulton *v.* Jones	45, 158, 260
Bourlier *v.* Macauley	224, 371, 373
Bowen *v.* Hall	372
v. Jones	92
Bower *v.* Peate	277
Bowler *v.* O'Connell	299
Bowling Green Savings Bank *v.* Todd	94
Boyce *v.* Bank	150
Boyson *v.* Thorn	372, 373
Bracey *v.* Carter	98
Brackett *v.* Lubke	274
Bradford *v.* Hanover Ins. Co.	202
Bradish *v.* Belknap	67
Bradlee *v.* Boston Glass Manufactory	171, 244
Bradstreet *v.* Baker	171, 238
v. Everson	120
Brady *v.* Todd	139, 141
Brainerd *v.* Dunning	46
Branch *v.* International, etc. Ry.	313
Brannock *v.* Elmore	275
Bray *v.* Gunn	61, 108
v. Kettell	236
Brazil Coal Co. *v.* Gaffney	355
Brevig *v.* Chicago, etc. R.	304, 307
Brice *v.* Bauer	314
Briggs *v.* Partridge	170, 237, 239, 251
v. Spaulding	124
Brigham *v.* Palmer	50
v. Peters	178
Bristow *v.* Whitmore	50
British Mutual Banking Co. *v.* Charnwood Forest Ry.	68, 195, 203, 204
British Waggon Co. *v.* Lea	159
Britton *v.* Turner	100
Broadbend *v.* Barlow	225
Brock *v.* Jones	59
Brockway *v.* Allen	240
v. Mullin	137, 143
Brodeur *v.* Valley Falls Co.	336
Brohl *v.* Lingeman	289
Bronson's Ex'r *v.* Chappell	66
Brook *v.* Hook	59
v. N. Y. etc. R.	207
Brookhaven *v.* Smith	64
Brooks *v.* Hassall	139
v. Jameson	145
v. New Durham	155
Brookshire *v.* Brookshire	79
Brothers *v.* Bank	189
Broughton *v.* Silloway	145, 153
Brower *v.* Wooten	57
Brown *v.* Andrew	35
v. Boston Ice Co.	308
v. Bradlee	230, 252, 255
v. Howard	357
v. Lally	145
v. Lent	365
v. Maxwell	332
v. Reiman	169
v. Smith	141
Browning *v.* Hinkle	202
Bruce *v.* Reed	309
Bryan *v.* Adler	323
Bryant *v.* Bank	135, 138
v. Flight	93
v. Moore	133
Bryne *v.* Massasoit Packing Co.	132, 133, 134
Bryson *v.* Lucas	238
Buckalew *v.* Tennessee Coal, etc. Co.	289, 335
Buckley *v.* Humason	103
Buckwalter *v.* Craig	141
Buffalo Lubricating Oil Co. *v.* Standard Oil Co.	211
Buller *v.* Harrison	256
Bunker *v.* Miles	110, 115
Burdick *v.* Garrick	114
Burkinshaw *v.* Nicolls	63
Burlingame *v.* Brewster	242
Burlington Ins. Co. *v.* Gibbons	144
Burmester *v.* Norris	138
Burnham *v.* Kidwell	29
Burns *v.* Pethcal	362
v. Poulsom	298, 299
Burnside *v.* Grand Trunk Ry.	182
Buron *v.* Denman	263, 366
Burrill *v.* Nahant Bank	38
Burt *v.* Palmer	182
Burton *v.* Goodspeed	164
v. G. H. & S. R.	201, 283
v. Great N. Ry.	99
v. Perry	189
Busch *v.* Wilcox	201
Bush *v.* Cole	153, 232
v. Steinman	278, 291
Bussey *v.* Donaldson	287
Butchers', etc. Bank *v.* Hubbell	217
Butler *v.* C., B. & Q. Ry. Co.	178

	Page
Butler *v.* Dorman	138, 140, 145
v. Knight	78
v. Manhattan Ry. Co.	181, 184
v. Maples	20, 129, 131, 133, 142
v. Murray	75
v. Price	34
v. Thompson	35
Butterfield *v.* Ashley	370
Butts *v.* Phelps	107
Byington *v.* Simpson	165, 166, 170, 237
Byrd *v.* Hughes	39
Byrne *v.* Eastmans Co.	352
v. Kansas City, etc. R.	283

C.

Cabot *v.* Shaw	256
Cahen *v.* Platt	101
Cahokia *v.* Rautenberg	255
Cairns *v.* Page	221
Calais Steamboat Co. *v.* Van Pelt	217
Calder *v.* Dobell	165, 170
Camden, etc. Co. *v.* Abbott	136, 146
Cameron *v.* New York Cent., etc. R.	345, 352
v. Oberlin	277
Campbell *v.* Cooper	371
v. Hillman	263, 264
v. Portland Sugar Co.	266, 364
v. Providence	297
v. Reeves	115, 117
v. Smith	39
Cannell *v.* Smith	102
Capen *v.* Pac., etc. Ins. Co	82
Capp *v.* Topham	105
Capper *v.* R. Co.	343
Cardot *v.* Barney	318
Carew *v.* Rutherford	370
Carey *v.* Rochereau	364
Carney *v.* Barrett	74
Carnochan *v.* Gould	151
Carpenter *v.* Farnsworth	240, 245
v. German Am. Ins. Co.	118, 192
Carr *v.* Clarke	369
v. Jackson	236
v. Ry. Co.	140
Carriger *v.* Whittington	234, 253
Carrol *v.* Bird	358
Carroll *v.* State	326
v. Staten Is. R.	351
Carter *v.* Beckwith	29
v. Howe Machine Co.	210
v. Slocomb	87, 89
Cartwright *v.* Wilmerding	221, 222
Casco Bank *v.* Keene	59
Casco N. B. *v.* Clark	239, 240, 245, 246
Case Mfg. Co. *v.* Soxman	240, 242
Casement *v.* Brown	9
Cass *v.* Rudele	237
Castle *v.* Duryee	317
v. Noyes	104
Caswell *v.* Cross	155
Catlin *v.* Bell	115, 117
Caughey *v.* Smith	370, 371
Cave *v.* Cave	190
Central of Georgia R. *v.* Price	75
Central R. *v.* Keegan	342
v. Peacock	310
Central Trans. Co. *v.* Pullman Car Co.	72
Chadwick *v.* Knox	94
Challiss *v.* Wylie	361
Chambers *v.* Baldwin	372, 373
v. Seay	79, 89
Chandler *v.* Coe	165, 170, 236
Chanoine *v.* Fowler	57
Chapin *v.* Holyoke, etc. Ass'n	321
Chapman *v.* Erie Co.	343, 352
v. N. Y. Cent., etc. R.	298
Charles *v.* Eshleman	32
Chase *v.* Debolt	250
Chastain *v.* Bowman	34
Chattachoochee Brick Co. *v.* Braswell	355
Cheever *v.* Pittsburgh, etc. R.	147
Chezum *v.* Kreighbaum	8
Chicago & Alton R. *v.* May	339, 343, 344
v. Pillsbury	311
v. Sullivan	345
Chicago Brick Co. *v.* Sobkowiak	356
Chicago, B. & Q. R. *v.* Honey	225
Chicago, etc. R. *v.* Brackman	304
v. Dickson	312
v. Epperson	312
v. Kerr	351
v. Moranda	334, 336, 337
v. Ross	18, 342
v. Swan	337
v. West	307
China, The	288

	Page
Chipley *v.* Atkinson	267, 372, 374
Chipman *v.* Forest	245
Church *v.* Chicago, etc. Ry.	292, 336
Ciriack *v.* Merchants' Woolen Co.	354
Citizens' Street R. *v.* Willoeby	314
City N. B. *v.* Dun	199, 200, 202
City of Anderson *v.* East	316
City of Boston *v.* Simmons	34
City of Findlay *v.* Pertz	49, 56, 148, 224
City of Kansas *v.* Hannibal, etc. R.	238
City of Richmond *v.* Long's Adm'r	316, 320
Claflin *v.* Cont. Jersey Works	143
v. Farmers', etc. Bk.	156
v. Lenheim	80, 81
Clark *v.* Clark (63 N. J. L. 1)	370
v. Clark (46 Conn. 586)	74
v. Cumming	152
v. Lovering	264
v. Randall	103, 154
v. Shee	217
Clarke *v.* Courtney	258
v. Tipping	112, 113
Clay *v.* People	328
Cleghorn *v.* N. Y. Cent. & H. R. R.	313
Clerk *v.* Laurie	89
Cleveland, etc. R. *v.* Jenkins	358
Cleveland, etc. Railroad Co. *v.* Walrath	285
Clews *v.* Jamieson	53
Clifford *v.* Burton	182
Clough *v.* Clough	38
Clowdis *v.* Fresno, etc. Co.	314
Clutterbuck *v.* Coffin	255
Coal & Mining *v.* Clay	344
Coates *v.* Lewis	173
Cobb *v.* Columbia, etc. R.	313
v. Knapp	169, 250
v. Superior Court	35
Cockcroft *v.* Muller	154
Cocke *v.* Dickens	176, 258
Cockran *v.* Irlam	115, 117
Coddington *v.* Goddard	35
Coe *v.* Smith	100
v. Wise	320
Coggin *v.* Central R. Co.	283
Coggs *v.* Bernard	122
Cohen *v.* Dry Dock, etc. R.	308
v. Kittell	107
Cole *v.* O'Brien	231
Coles *v.* Trecothick	117
Collen *v.* Gardner	127, 131
v. Wright	230, 231
Collins *v.* Buck	94
v. Buckeye State Ins. Co.	240
v. Cooper	142
v. Tillou	112
Collman *v.* Mills	325
Columbia Bridge Co. *v.* Geisse	179
Colyar *v.* Taylor	123
Combe's Case	115
Combs *v.* Scott	47, 51
Comegys *v.* American Lumber Co.	179
Comfort *v.* Graham	103, 234
Commercial Bank *v.* Armstrong	217
v. French	177
v. Norton	116
Commercial, etc. Co. *v.* State	144
Comm. *v.* Briant	327
v. Canal Commissioners	35
v. Kelley	325
v. Morgan	324, 328
v. Nichols	325, 327
v. Stevens	327
v. Wachendorf	325, 327
Concord *v.* Bank	156
Cone *v.* Delaware, etc. R.	351
Conkey *v.* Bond	110
Conrad *v.* Ithaca	316, 317
Consolidated Coal Co. *v.* Haenni	353
v. Seniger	287
Consolidated Co. *v.* Curtis	265
Consolidated Nat. Bk. *v.* Pacific, etc. Co.	138
Constant *v.* University of Rochester	189
Continental Ins. Co. *v.* Ruckman	143, 144
Conway *v.* Ill. Cent. R.	351
Conwell *v.* Voorhees	317
Cook *v.* R. Co.	353
v. Tullis	60
Cooke *v.* Eshelby	174
v. State Bank	156
v. Wilson	261
Cooley *v.* Perrine	141
Coombs *v.* New Bedford Cordage Co.	353, 355
Coon *v.* Syracuse, etc. R.	332, 333, 337
Cooper *v.* Milwaukee, etc. R.	333
Cope *v.* Rowlands	103
Copeland *v.* Mercantile Ins. Co.	79
Coppen *v.* Moore	326

	Page
Coppins *v.* New York Cent., etc. R.	341, 345
Cordes *v.* Miller	83
Cornfoot *v.* Fowke	198, 199
Cornwal *v.* Wilson	49
Corser *v.* Paul	59
Costigan *v.* Mohawk	98
Cothay *v.* Fennell	161, 164
Coughtry *v.* Globe Woolen Co.	278
Countess of Salop *v.* Crompton	361
Coursolle *v.* Weyerhauser	28, 55
Cousins *v.* Hannibal, etc. R.	297, 313
Couturier *v.* Hastie	121
Covell *v.* Hart	230
v. Hill	221
Coventry *v.* Barton	105
Covington, etc. Bridge Co. *v.* Steinbrock	277
Cox *v.* Bruce	206
v. Prentice	256
Cragie *v.* Hadley	188
Cragin *v.* Lovell	239, 241
Craig *v.* Charleston	317
Craighead *v.* Peterson	135, 136
Crain *v.* First N. B.	138, 139, 156
Craker *v.* Chicago, etc. R.	310, 313
Crane *v.* Gruenewald	131, 145
Crawford *v.* Scovell	29
Cream City Glass Co. *v.* Friedlander	251
Cregan *v.* Marston	341
Cribben *v.* Deal	32, 38
Crispin *v.* Babbitt	334, 338, 342, 343, 344, 350
Cromwell *v.* Benjamin	74
Cropper *v.* Cook	103
Crosby *v.* Hill	145, 152
Cross *v.* Haskins	145
Crosskey *v.* Mills	114
Crowfoot *v.* Gurney	87, 90, 257
Crown *v.* Orr	353, 355
Crump *v.* Ingersoll	34
Cullen *v.* Thomson	263
Culver *v.* Streator	317
Cummings *v.* Chicago, etc. R.	285
v. Sargent	143
Cummins *v.* Heald	120
Cunningham *v.* Reardon	74
Curran *v.* Galen	372
Curtin *v.* Somerset	365
Curtis *v.* Kiley	278
Curtis *v.* Williamson	169
Cushing *v.* Rice	223
Cutter *v.* Gillette	97, 98
v. Powell	92, 96, 99

D.

	Page
Dadswell *v.* Jacobs	112, 113
Dale *v.* Donaldson	231
Dalheim *v.* Lemon	289
Dalton *v.* Irvin	98
Daly *v.* Bank	120
Danby *v.* Coutts	77
Daniel *v.* R.	311
v. Swearenger	224
D'Arcy *v.* Lyle	104
Darrow *v.* Horne Produce Co.	164, 165, 172, 173, 176
Daugherty *v.* Herzog	365
Daves *v.* Southern Pac. Co.	361
Davidson *v.* Donaldson	168
v. Goodall	370
Davis *v.* Caldwell	74
v. England	241
v. Forbes	355, 356
v. Hamlin	110
v. Kobe	150
v. Lane	30, 84
v. Maxwell	101
v. Waterman	192
Dawes *v.* Jackson	171
Day *v.* Holmes	139
Daylight Burner Co. *v.* Odlin	130, 139, 141, 150
Dayton *v.* Warne	238
Deakin *v.* Underwood	35
Dean *v.* Brock	364
v. Peel	369
Dearborn *v.* Bowman	26
De Bussche *v.* Alt	36, 111, 115, 118, 119, 120
Deford *v.* State	275
DeGraff *v.* New York Cent., etc. R.	356
Delafield *v.* Illinois	136
v. Smith	95
Delaney *v.* Rochereau	263, 264, 364
Delano *v.* Case	124
Delaware, Lackawanna, etc. R. Co. *v.* W. R. Hardy	284
Demarest *v.* Barbadoes	215

	Page
Deming *v.* Terminal Ry. Co.	277
Dempsey *v.* Chambers	42, 50, 52, 57, 60, 194, 298, 300, 301
Denney *v.* Manhattan R.	362
Dennis *v.* Clark	74, 369
Dennison *v.* Seymour	287
Denver, etc. R. *v.* Harris	313
Derby *v.* Johnson	97
Derry *v.* Peek	196
Despatch Line *v.* Bellamy Mfg. Co.	55, 143
Devall *v.* Burbridge	108, 111
Devendorf *v.* West Virginia, etc. Co.	241, 243
Devinney *v.* Reynolds	238
Devoss *v.* Gray	33
Dewey *v.* Union School Dist.	83
DeWitt *v.* Walton	241
Dexter *v.* Hall	29
v. Norton	83
Dick *v.* Cooper	182
Dickenson *v.* Naul	261
Dickinson *v.* Bank	87, 89
v. Calahan's Adm'rs	159
Dickson *v.* Waldron	321
Die Elbinger Actiengesellschaft *v.* Claye	170, 236
Diefenback *v.* Stark	100, 101
Dieringer *v.* Meyer	81
Dingle *v.* Hare	139, 141, 150
Distilled Spirits, The	186, 189
Diversy *v.* Kellogg	141
Dixon *v.* Bell	368
v. Chicago, etc. R.	334, 336
v. Ewart	86
Dodd *v.* Farlow	141, 152
Dodge *v.* Granger	317
v. Hopkins	53
Doe *v.* Goldwin	57
v. Walters	57
Dolan *v.* Thompson	121
Donahoe *v.* McDonald	217, 267
Donaldson *v.* Commissioners	319
Donelley *v.* Popham	58
Donivan *v.* Manhattan Ry.	301
Donnelly *v.* San Francisco Bridge Co.	343
Donovan *v.* Laing	280, 283
v. McAlpin	318
Dorchester Bk. *v.* New England Bk.	120
Doubleday *v.* Kress	145
Dougherty *v.* West Superior Iron Co.	356
Dow *v.* Johnson	366
Downes *v.* Harper	318
Downey *v.* Burke	100
v. Low	276
Downman *v.* Williams	230
Drain *v.* Doggett	146
Dresser *v.* Norwood	189
Drew *v.* Nunn	29, 30, 84, 233
Drinkwater *v.* Goodwin	150, 262
Drummond *v.* Crane	159
Drury *v.* Foster	39
Ducarrey *v.* Gill	171
Dugan *v.* Anderson	97
Dun *v.* City N. B.	120, 202
Duncan *v.* Baker	100
v. Findlater	318
v. Hill	103, 105
v. Jaudon	190
v. Niles	231
Dung *v.* Parker	231
Dunlop *v.* Munroe	317
Dunn *v.* Hall	209
v. Macdonald	255
Durant *v.* Roberts	45
Durden *v.* Barnett	368
Durkin *v.* Kingston Coal Co.	287
Durnford *v.* Patterson	122
Durrell *v.* Evans	137
Dusenbury *v.* Ellis	231
Dustan *v.* McAndrew	75
Dutton *v.* Marsh	239
v. Willner	113, 115
Duvall *v.* Wellman	39, 103
Dwinelle *v.* N. Y. C. & H. R. R.	285, 310
Dyer *v.* Munday	308
Dyett *v.* Hyman	299

E.

Eager *v.* Grimwood	369
Eaglesfield *v.* Londonderry	264
Earle *v.* Earle	31
Eason *v.* S. & E. T. Ry.	293
East St. Louis Connecting Ry. *v.* Reames	313
Eastern R. Co. *v.* Benedict	164
Eaton *v.* New York Cent., etc. R.	342

Page

Eberts *v.* Selover 50
Eddy *v.* Livingston 122
Edgecombe *v.* Buckhout 85
Edmunds *v.* Bushell 138, 142, 143, 147
Edwards *v.* Dillon 32
Eggleston *v.* Boardman 116, 117, 176
v. Wagner 38
Eichbaum *v.* Irons 235
Eighmy *v.* Union Pac. Ry. 319
Eiseman *v.* Schneider 37
Eldridge *v.* Atlas Steamship Co. 355
v. Walker 110, 115
Electric Ry. *v.* Lawson 340
Elkhart County Lodge *v.* Crary 39
Elledge *v.* Ry. Co. 183
Elliott *v.* Chicago, etc. Ry. 356
v. Swartwout 256
v. Turquand 86
Ellis *v.* Goulton 256
v. New York, etc. R. 351
v. Sheffield Gas Consumers Co. 275
Elwell *v.* Shaw 171
Empire Mill Co. *v.* Lovell 182
Engel *v.* Eureka Club 275
Engelhart *v.* Farrant 292, 299
Entwisle *v.* Dent 136
Eoff *v.* Irvine 111
Episcopal Church *v.* Wiley 113
Ermentrout *v.* Girard, etc. Ins. Co. 144
Espy *v.* Bank 156
Estes *v.* Worthington 362
Evans *v.* Davidson 299, 305
v. Smallcombe 54
v. Waln 174
v. Walton 371
Evansville R. *v.* Guyton 345
Evarts *v.* St. Paul, etc. Ry. 293
Evrit *v.* Bancroft 262
Ewald *v.* R. Co. 344
Ewan *v.* Lippincott 284, 335
Exchange Bank *v.* Rice 159
Exchange N. B. *v.* Third N. B. 119
Ex parte Birmingham Banking Co. 117
Bright 8
Cooke 226
Edwards 256
Hartop 230
Mather 104
Snowball 86
Sutton 116
White 8, 227

F.

Page

Factors, etc. Co. *v.* Maine Dry Dock, etc. Co. 191
Fairbanks *v.* Snow 28
Fairchild *v.* King 117
v. McMahon 60, 201
Fairfield Savings Bank *v.* Chase 189, 191
Fairlie *v.* Fenton 213, 262
v. Hastings 180, 181, 182
Fairmount Ry. *v.* Stutler 368
Falk *v.* Moebs 245, 248
Farebrother *v.* Simmons 35
Farmers', etc. Co. *v.* Wilson 84, 88, 253
Farmers' & M. Bank *v.* Butchers' & D. Bank 70
Farmers', etc. Bank *v.* King 226
Farmington Sav. Bank *v.* Buzzell 146
Farr *v.* John 153
Farrel Foundry Co. *v.* Dart 191
Farrington *v.* South Boston R. 206
Farry *v.* Great Northern Ry. 309
Farwell *v.* Boston, etc. R. 193, 332
Faviell *v.* Eastern Counties R. 155
Fay *v.* Winchester 136
Fellows *v.* Hartford, etc. Co. 80, 81
Felt *v.* School Dis. 109
Felton *v.* Harbeson 343
Feltus *v.* Swan 364
Fenn *v.* Harrison 127, 132
Feoffees of Heriot's Hospital *v.* Ross 318
Ferguson *v.* Carrington 48
Ferrand *v.* Bischoffsheim 175
Fetrow *v.* Wiseman 27
Fifth Ave. Bank *v.* Forty-Second St., etc. Co. 195, 206
Firbank's Ex'rs *v.* Humphreys 231, 232
Fire Ins. Patrol *v.* Boyd 318, 321
First N. B. *v.* Cody 63, 64
v. Fourth N. B. 109
v. Hall 248, 259
v. Shaw 220, 221
v. Sprague 120
v. Wallis 246
Fisher *v.* Drewett 96
v. Krutz 111
Fiske *v.* Enders 297
Fitch *v.* Lewiston Steam Mills Co. 38
Fitzgerald *v.* Connecticut Paper Co. 356

	Page
Fitzhugh *v.* Wiman	267
Fitzmaurice *v.* Bayley	51
Fitzsimmons *v.* Joslin	199
v. Railway Co.	307
Flannagan *v.* California N. Bank	156
Fleckner *v.* Bank of U. S.	60
Fleet *v.* Murton	250
Fleming *v.* Hartford F. Ins. Co.	144
Flemyng *v.* Hector	32, 33, 234, 235
Flesh *v.* Lindsay	31
Fletcher *v.* Baltimore and Potomac R.	301
v. G. W. El. Co.	207
v. Harcot	104
Flike *v.* Boston and A. R.	341, 352
Flinn & Co. *v.* Hoyle	236
Flint *v.* Norwich	311
Floyd Acceptances, The	137
Flynn *v.* Messenger	73
Fogg *v.* Boston & Lowell R.	209
v. Pew	180
Folger *v.* Chase	248
Forbes *v.* Hagman	54
Forcheimer *v.* Stewart	152
Ford *v.* Fitchburg R.	341
v. Williams	164, 165
Foreman *v.* Mayor	319
Fores *v.* Wilson	370
Forney *v.* Shipp	250
Forsyth *v.* Day	238
v. Hastings	101
Fortune *v.* Trainor	309
Forward *v.* Cont. Ins. Co.	143
Foster *v.* Bates	46
v. Smith	260
v. Wadsworth-Howland Co.	274
Fothergill *v.* Phillips	50
Fowler *v.* Callan	103
Fowles *v.* Bowen	357
Fowlkes *v.* Baker	74
Fox *v.* Chicago, etc. Ry. Co.	76
v. Peninsular Lead Works	341, 352
v. Stevens	369
Fradley *v.* Hyland	163, 169
Fraker *v.* St. Paul, etc. R.	333
Frank *v.* Jenkins	48
Frankland *v.* Johnson	240, 244
Franklin *v.* R. Co.	351
Franklin Bank Note Co. *v.* Mackey	130
Frazier *v.* Erie Bank	227
Freeman *v.* Cooke	131
Freeman *v.* Glens Falls Paper Mill Co.	355
v. Robinson	74
v. Rosher	51
Freeman's Bank *v.* National Tube Works	217
French *v.* Cresswell	307
Frenkel *v.* Hudson	190
Friedlander *v.* Ry.	68, 69, 195, 202, 203, 204, 206
Frink *v.* Roe	88, 136, 141
Frith *v.* Cartland	225
Frixione *v.* Tagliaferro	95
Frothingham *v.* Everton	107
Frue *v.* Loring	227
Fry *v.* Lockwood	256
Fuller *v.* Hooper	258
v. Jewett	341, 344
v. Wilson	199
Fulton Mills *v.* Wilson	348
Furman *v.* Van Sise	369

G.

Gabrielson *v.* Waydell	157
Gadd *v.* Houghton	230, 252
Gaetano & Maria, The	157
Gagnon *v.* Dana	280
Gaither *v.* Myrick	75
Gardiner *v.* Davis	261
Gardner *v.* Allen	173
v. Gardner	38
v. Ogden	113
Garland *v.* Dover	248
Garner *v.* Mangam	201
Garratt *v.* Cullum	162
Garrey *v.* Stadler	93
Garth *v.* Howard	180
Gaussen *v.* Morton	87, 89
Geisinger *v.* Beyl	111
Gelatt *v.* Ridge	61, 95
George *v.* Clagett	173
v. Gobey	323
Georgia R. *v.* Newsome	312
Gerli *v.* Poidebard Silk Mfg. Co.	101
German Fire Ins. Co. *v.* Grunett	142
Gibbs *v.* Baltimore, etc. Co.	103
Gibson *v.* Soper	29
v. Winter	258, 262
Gihon *v.* Stanton	121

	Page
Gilbert *v.* Holmes	79
v. How	33, 135
v. Schwenck	368
Gill *v.* Bicknell	35
v. Middleton	122
Gillespie *v.* Lincoln	317
Gillett *v.* Peppercorne	110
v. Whiting	49
Gilley *v.* Gilley	74
Gilson *v.* Collins	361
Glaspie *v.* Keator	224
Glavin *v.* Rhode Island Hospital	319
Glencoe Land, etc. Co. *v.* Commission Co.	372
Goddard *v.* Grand Trunk R.	314
Godman *v.* Meixsel	103
Godshaw *v.* Struck	75
Godwin *v.* Francis	233
Gooch *v.* Association	319
Goodenow *v.* Tyler	150
Goodspeed *v.* East Haddam Bank	211, 310
Goodwin *v.* Bowden	90, 257
v. Roberts	147, 216
Gordon *v.* Brewster	97
v. Bulkeley	37
v. Potter	74
Gorman *v.* Gross	276
v. Smith	9
Goss *v.* Stevens	55
Gould *v.* Norfolk Lead Co.	179
Governors, etc. *v.* Meredith	317
Grady *v.* American Cent. Ins. Co.	116
Grafton N. B. *v.* Wing	242, 248
Graham *v.* St. Charles St. Ry.	209, 374
Grammar *v.* Nixon	198
Grand Trunk Ry. *v.* Latham	361
Grant *v.* Beard	42, 60, 230
v. Norway	206
v. Ry.	54
Grapel *v.* Hodges	84
Graves *v.* Horton	127
Gray *v.* Agnew	219, 222
v. Durland	369
v. Haig	112, 113
Great N. Ry. *v.* Kasischke	354
Great W. Ry. *v.* Willis	181, 182
Green *v.* Elgie	266
v. Gilbert	99
v. Kopke	236
v. Maitland	112
Green *v.* Mules	92, 96
v. New River Co.	361
Greenberg *v.* Whitcomb Lumber Co.	361
Greenfield Bank *v.* Crafts	59
Greenfield Sav. Bk. *v.* Simons	110
Greenlief *v.* Moody	150
Greenwood, etc. Co. *v.* Georgia Home Ins. Co.	110
Greer *v.* Louisville, etc. R.	340
Gribben *v.* Maxwell	29
Grice *v.* Kenrick	262
Griffiths *v.* Earl of Dudley	346, 349
v. Wolfram	361
Griggs *v.* Swift	80, 86
Grimes *v.* Young	308
Grinnell *v.* Wells	369
Grinton *v.* Strong	7
Grist *v.* Backhouse	176, 258
Griswold *v.* Gebbie	201
v. Haven	195
Grojan *v.* Wade	176
Groover *v.* Warfield	262
Grund *v.* Van Vleck	44
Guelich *v.* National State Bank	120
Guerreiro *v.* Peile	141, 150
Gulf, etc. Ry. *v.* Kirkbride	301
Gulick *v.* Grover	130, 131
Gundlach *v.* Fischer	77
Gunn *v.* Roberts	157
Gurley *v.* Armstead	266
Guthrie *v.* Armstrong	35
Guy Mannering, The	287
Gwilliam *v.* Twist	76, 291, 292

H.

Haas *v.* Balch	356
v. Damon	113
Hadley *v.* Heywood	371
Hagedorn *v.* Oliverson	43, 46
Hager *v.* Rice	247
Haines *v.* Pohlmann	145
v. Schultz	313
Hall *v.* Crandall	231
v. Finch	25, 26
v. Hollander	368
v. Lauderdale	232, 254
v. Storrs	109
Halley, The	287

	Page
Halliday *v.* Nat. Tel. Co.	274
v. Stuart	155
Haluptzok *v.* Great Northern Ry. Co.	36, 40, 118, 291
Hamilton *v.* Love	98
Hamlin *v.* Abell	263, 264
v. Sears	44
Hammond *v.* Hannin	56
Hancock *v.* Hodgson	237
Hancock Bank *v.* Joy	243
Hand *v.* Clearfield Coal Co.	98
v. Cole	19
Hanford *v.* McNair	37, 55
Hankins *v.* New York, etc. R.	341, 343
Hannon *v.* Siegel-Cooper Co.	196, 296
Hardy *v.* Shedden Co.	280, 282
v. Waters	28
Harlan *v.* Ely	109, 141
Harley *v.* Buffalo, etc. Co.	351
Harper *v.* Little	84
v. Tiffin N. B.	169, 172
Harralson *v.* Stein	118
Harrigan *v.* Welch	261
Harriman *v.* Stowe	184, 364, 365
Harrington *v.* Churchward	95
v. Gies	98
Harris *v.* Johnston	135
v. Simmerman	145
v. Truman	226
Harrison *v.* Collins	9
v. Grady	73
Harsant *v.* Blaine	113
Hart *v.* Aldridge	370
v. Ten Eyck	113
Hartas *v.* Ribbons	105
Hartfield *v.* Roper	5
Hartford Ins. Co. *v.* Farrish	144
Hartley's Appeal	79
Hartwig *v.* Bay State, etc. Co.	288
Harvey *v.* Merrill	105
v. R. Co.	343
Haskell *v.* Starbird	68, 201
Haskins *v.* Royster	224, 370
Hastings *v.* Dollarhide	28
Hasty *v.* Sears	280, 284
Hatch *v.* Ferguson	191
v. Squires	178
v. Taylor	131, 133, 134
Hathaway *v.* Johnson	200
Haven *v.* Brown	81
Haver *v.* Central R.	310
Hawk *v.* Garman	289
Hawke *v.* Cole	32, 45
Hawkins *v.* McGroarty	56
v. Rockford Ins. Co.	144
Hawley *v.* Keeler	35
v. Northern Central R.	354
Hawtayne *v.* Bourne	143
Hayes *v.* Willio	105
Hays *v.* McConnell	93
Hazard *v.* Spears	108
v. Treadwell	15
Hazeltine *v.* Miller	131
Head *v.* Porter	366
Heald *v.* Kenworthy	167
Healey *v.* Lothrop	321
Hearns *v.* Waterbury Hospital	319, 320
Heath *v.* Goslin	235
v. Nutter	55
v. Paul	138
Hedden *v.* Griffin	264
Heffron *v.* Pollard	236, 252
Hefner *v.* Vandolah	59
Hegenmyer *v.* Marks	111, 224
Heineman *v.* Heard	108
Hempfling *v.* Burr	264
Henderson *v.* Ford	85
v. McNally	174
v. Mayhew	162
Henry *v.* Heeb	59
Henson *v.* Hampton	100
Hentz *v.* Miller	218
Herd *v.* Bank of Buffalo	45
Hermes *v.* Chicago, etc. Ry.	184
Hern *v.* Nichols	15, 198
Herring *v.* Hoppock	299
v. Skaggs	140, 141
Hertzog *v.* Hertzog	26, 93
Hess *v.* Rau	87, 89, 90
Hewett *v.* Swift	266, 300
Hewlet *v.* George	289
Hexamer *v.* Webb	274
Heyn *v.* O'Hagen	49
Heys *v.* Tindall	108
Hibbard *v.* Peek	139
Hibblewhite *v.* McMorine	37, 38
Hicks *v.* Burhans	26, 94
Hiern *v.* Mill	187
Higgins *v.* Moore	138, 140, 145, 152
v. Senior	165, 251, 252
v. Watervliet Turnpike Co.	306
v. W. U. Tel. Co.	279, 284

	Page
Hilbery *v.* Hatton	52, 57
Hill *v.* Boston	316
v. Caverly	365
v. Morey	293
v. North	187
v. Wand	66
Hilts *v.* Chicago, etc. R.	345
Hinckley *v.* Arey	110
v. Southgate	36
Hines *v.* Charlotte	316
Hirshfield *v.* Waldron	145
Hissong *v.* Richmond, etc. Ry.	349
Hitchcock *v.* Buchanan	245
Hobhouse *v.* Hamilton	250
Hoboken Printing, etc. Co. *v.* Kahn	210
Hobson *v.* Hassett	241
Hochester *v.* De la Tour	97
Hodgson *v.* Dexter	171, 238, 255
Hoffman *v.* Carow	265
v. R. Co.	303, 304, 306
Hogan *v.* Shorb	174
v. Smith	352
Hogg *v.* Snaith	136
Holbrook *v.* Chamberlin	55, 56
Holden *v.* New York and Erie Bank	188
Holding *v.* Elliott	230
Hole *v.* Sittingbourne R. Co.	276
Holland *v.* Russell	256
Holliday *v.* St. Leonard's	320
Hollins *v.* Fowler	265
Hollis *v.* Wells	370
Hollman *v.* Pullin	234, 260
Holman *v.* Frost	215
Holmes *v.* Lucas Co.	215
Holt *v.* Ely	262
Home Machine Co. *v.* Ballweg	145
Homer Ramsdell Transportation Co. *v.* La Compagnie Générale Transatlantique	288
Honner *v.* Ill., etc. R.	333
Hood *v.* Reeve	180
Hoover *v.* Wise	191
Hopkins *v.* Mehaffy	254
v. Mollinieux	34
v. Oxley Stave Co.	374
Hoppe *v.* Saylor	233
Horford *v.* Wilson	96
Horgan *v.* Pacific Mills	369
Horn *v.* Cole	63
Horn *v.* Western Land Ass'n	98
Hornby *v.* Lacy	121, 172
Horr *v.* Barker	222
Horton *v.* McCarty	35
Hough *v.* Texas, etc. R.	356
Houghton *v.* First Nat. Bk.	248
v. Matthews	150
Houldsworth *v.* Glasgow Bank	199, 203
Housatonic Bk. *v.* Martin	191
Houseman *v.* Girard, etc. Ass'n	189
Hoverson *v.* Noker	289
Hovey *v.* Hobson	29
Howard *v.* Baillie	135
v. Chapman	151
v. Crowther	370
v. Daly	96, 97, 98
v. Duncan	59
v. Patent Ivory Co.	44
v. Sheward	139
v. Worcester	317
Howard's Case	117
Howe *v.* Keeler	38
v. Newmarch	306
Howe Machine Co. *v.* Clark	178
Howell *v.* Batt	257
v. Caryl	155
v. Gordon	87
v. Graff	134
Howland *v.* Woodruff	221
Hubbard *v.* Tenbrook	142, 143, 164, 166
Hubbell *v.* Denison	156
Hudson *v.* Granger	174
v. Randolph	190
Huff *v.* Ford	10, 281
Hughes *v.* Graeme	233
v. Wamsutta Mills	85, 86, 99
Hughson *v.* Richmond, etc. R. R.	335
Hulbut *v.* Marshall	31
Humble *v.* Hunter	159, 165, 175, 176, 259
Hun *v.* Cary	124, 125
Hundley *v.* Louisville, etc. R.	358
Hunn *v.* Michigan, etc. R.	343
Hunt *v.* Douglass	117
v. Great N. Ry.	357
v. Rousmanier	79, 84, 88, 89
v. Wotton	369
Hunter *v.* Giddings	259
Huntington *v.* Knox	164, 165, 172

	Page
Huntley *v.* Mathias	67, 127, 130, 135, 137
Hurlbert *v.* Bringham	94
Hussey *v.* Norfolk, etc. R.	210
Hutcheson *v.* Peck	371
Hutchings *v.* Munger	146
Hutchins *v.* Brackett	317
Hutchinson *v.* Tatham	250
v. Wetmore	100
v. Wheeler	250
v. York	332
Hutton *v.* Bulloch	170, 236
Hyatt *v.* Clark	47, 48, 51, 186
Hyde *v.* Cooper	321

I.

Illinois Cent. R. *v.* King	303
v. Latham	300, 307
Illinois Steel Co. *v.* Mann	356
Ilsley *v.* Merriam	174
Imperial Loan Co. *v.* Stone	29
Indianapolis Chair Mfg. Co. *v.* Swift	179
Indianapolis, etc. Ry. *v.* Tyng	199
v. Morris	75
v. Watson	356
Innerarity *v.* Merchants' Nat. Bk.	190, 191
In re Broomhead	94
Consort Deep Level Gold Mines	65
Cunningham	138, 147
D'Angibau	34
Day	154
Hannan's, etc. Co.	89
London, etc. Bk.	99
North Australian Territory Co.	115
Northumberland Avenue Hotel Co.	44
Portuguese, etc. Mines	52
Succession of Lanaux	84
Insurance Co. *v.* Davis	87
International, etc. Ry. *v.* Anderson	304
Ireland *v.* Livingston	130, 136
Ironwood Stove Co. *v.* Harrison	54
Irvine *v.* Grady	187
v. Union Bank	58
Irvine *v.* Watson	168
Irwin *v.* Reeves Pulley Co.	120
v. Williar	39, 103
Isaacs *v.* Third Ave. Railroad Co.	306, 310
Isberg *v.* Bowden	258
Isham *v.* Burgett	236
v. Post	122

J.

Jackson *v.* Hopperton	358
v. Mutual Benefit Life Ins. Co.	145, 146
v. Nat. Bk.	138, 139, 146, 147, 216
James *v.* Allen County	97
v. Bixby	252
v. O'Driscoll	26
v. Ricknell	155
v. Russell	65
Janes *v.* Citizens' Bank	240
Jansen *v.* McCahill	38
Jefferson *v.* Asch	159
Jeffrey *v.* Bigelow	182, 200
Jeffries *v.* Ins. Co.	35
Jenkins *v.* Bacon	123
v. Hutchinson	231
Jennings *v.* Lyons	99
Jetley *v.* Hill	130
Jett *v.* Hempstead	113, 114
Jilson *v.* Gilbert	37
Joel *v.* Morison	297
v. Woman's Hospital	319
Johanson *v.* Pioneer Fuel Co.	308
Johnson *v.* Armstrong	250
v. Barber	362, 365
v. Buck	153
v. Dodge	37
v. Hurley	67, 129, 130, 140
v. Johnson's Adm'r	84
v. Lindsay	335
v. Martin	361
v. Nat. Bank	343
v. Richmond, etc. Ry.	348
v. Sumner	73
Johnston *v.* Milwaukee, etc. Co.	127, 129
Jones *v.* Adler	96
v. Atkinson	50, 59
v. Avery	19

	Page
Jones *v.* Blocker	370
v. Corporation of Liverpool	281
v. Hope	45
v. Jackson	247
v. Littledale	230, 251
v. Phipps	142
v. St. Louis S. W. Ry.	335
v. Scullard	281, 282
Jordan *v.* Norton	127
v. Wright	74
Joseph *v.* Knox	261
Josephs *v.* Pebrer	103
Joslin *v.* Grand Rapids Ice Co.	281
Josselyn *v.* McAllister	61
Judkins *v.* Walker	101

K.

Kaare *v.* Troy Steel Co.	357
Kaltenbach *v.* Lewis	174
Karnak, The	157
Kaulback *v.* Churchill	170, 236
Kausal *v.* Minnesota, etc. Ins. Co.	144
Kayton *v.* Barnett	162, 166
Kean *v.* Davis	240, 244
Kearley *v.* Tonge	325
Keating *v.* Hyde	39
v. R.	307
Keator *v.* St. John	224
Keay *v.* Fenwick	33, 95
Keefe *v.* Sholl	200
Keenan *v.* Southworth	317
Keene *v.* Sage	257
Kehler *v.* Schwenk	355
Keidan *v.* Winegar	240
Keighley *v.* Durant	45, 46, 160, 213
Kelley *v.* Davis	74
v. Newburyport Horse R.	47, 51
Kelly *v.* Metropolitan Ry.	364
v. Thuey	176, 235
Kelner *v.* Baxter	44, 234
Kendall *v.* Hamilton	169
Kennedy *v.* Green	186
v. McKay	200
v. Ryall	365
Kent *v.* Bornstein	262
v. Quicksilver Mining Co.	50
Kenton Ins. Co. *v.* McClellan	30
Keokuk Falls Imp. Co. *v.* Kingsland, etc. Co.	240
Kerfoot *v.* Hyman	110, 113
Kershaw *v.* Kelsey	33, 86
Ketcham *v.* Newman	275, 300
Kiersted *v.* R. R. Co.	237
Kiewert *v.* Rindskopf	112
Kilgour *v.* Finlyson	138
Kimball *v.* Billings	265
Kindig *v.* March	90
King *v.* Batterson	176
v. Longnor	38
v. New York Central, etc. R.	9
v. Sparks	146
Kingsley *v.* Davis	169
v. Siebrecht	165
Kinsey *v.* Leggett	221
Kirkpatrick *v.* Stainer	170, 236
Kirk's Appeal	155
Kirkstall Brewery Co. *v.* Furness Ry.	182
Kline *v.* Bank	240
Knapp *v.* Alvord	88, 89
v. Simon	169
Knatchbull *v.* Hallett	225
Knight *v.* Clark	238, 255
Knisley *v.* Pratt	353, 355
Knowles *v.* Bullene	309
Knox *v.* Flack	28
Komorowski *v.* Krumdick	142
Kosminsky *v.* Goldberg	290
Kozel *v.* Dearlove	56
Krantz *v.* R.	310
Kreiter *v.* Nichols	323
Kroeger *v.* Pitcairn	230, 231
Krumm *v.* Beach	201
Krutz *v.* Fisher	111

L.

Lacy *v.* Getman	84, 159
La Farge *v.* Kneeland	256
Lafferty *v.* Jelly	113
Laflin, etc. Co. *v.* Sinsheimer	246
Laing *v.* Butler	169
Lakeman *v.* Pollard	83
Lake Shore, etc. R. *v.* Prentice	313
Lake Shore, etc. Ry. Co. *v.* Spangler	348
Lamm *v.* Port Deposit, etc. Ass'n	180, 202

Page

Lamothe *v.* St. Louis, etc. Co. 80, 82
Lampley *v.* Scott 122
Lancaster *v.* Knickerbocker Ice Co. 237
Lane *v.* Black 60
v. Cotton 263, 317, 362
v. Pere Marquette Boom Co. 215
Langan *v.* Great W. Ry. 76
Langhorn *v.* Allnut 179
Laning *v.* N. Y. Cent., etc. R. 252, 256
Larkin *v.* Hapgood 256
La Rue *v.* Goezinger 117, 159
Laubheim *v.* DeK. N. S. Co. 284
Laugher *v.* Pointer 281
Laussatt *v.* Lippincott 118
Laverty *v.* Snethen 107, 117
Law *v.* Stokes 141, 145
Lawrence *v.* Fox 159
v. Gullifer 98
v. McArter 28
v. Shipman 9, 274, 275, 276, 279
Lawton *v.* Waite 361
Lawyer *v.* Fritcher 369, 370, 371
Leadbitter *v.* Farrow 239
Leatherberry *v.* Odell 98
Lebanon Savings Bank *v.* Hollenbeck 189
Lee *v.* Fontaine 50
v. Lord 301
v. Mathews 263
v. Munroe 135
v. Percival 242
v. Walker 108
Lehow *v.* Simonton 160
Leighton *v.* Sargent 108
Lennard *v.* Robinson 252
Leopold *v.* Salkey 86
Lerned *v.* Johns 165
Le Roy *v.* Beard 135, 138, 141
Leu *v.* Mayer 179
Leuthold *v.* Fairchild 265
Levi *v.* Booth 66, 140, 219
Levitt *v.* Hamblet 140, 166
Levy *v.* Barnard 94
v. Spencer 102
Lewis *v.* Atlas, etc. Ins. Co. 81
v. Brehme 121
v. Duane 155
v. Ins. Co. 99
v. Long Island R. 280
v. Nicholson 231

Page

Lewis *v.* Ramsdale 135
v. Read 51
v. Samuel 103
v. Tilton 234
Lewson *v.* Kirk 361
Libby *v.* Scherman 355
Lickbarrow *v.* Mason 8
Liddell *v.* Chidester 96
Liebscher *v.* Kraus 240, 242
Lilly *v.* Smales 232, 254
Limpus *v.* London General Omnibus Co. 306
Linnehan *v.* Rollins 9, 274, 278
Linneman *v.* Moross 159
Lipe *v.* Eisenlerd 369
Lister *v.* Stubbs 227
Little *v.* Fosset 267
v. Gallus 111
v. Hackett 280
Little Miami Railroad Co. *v.* Fitzpatrick 344
Little Miami R. *v.* Stephens 334, 338, 339
v. Wetmore 311
Little Rock, etc. Ry. *v.* Eubanks 348
Lockwood *v.* Levick 96
London, etc. Ass'n *v.* Kelk 54
London Stock Bank *v.* Simmons 216
Long *v.* Colburn 241
v. Hartwell 37
v. Millar 230
v. Thayer 84, 253
v. Tribune Printing Co. 209
Loomis *v.* New York, etc. R. 183
v. Simpson 115, 117
Lorentz *v.* Robinson 350
Louis *v.* Smellie 111
Louisville, etc. R. *v.* Collins 340
Louisville, etc. R. Co. *v.* Orr 348
Love *v.* Miller 96
Lovell *v.* Howell 332
Lowenstein *v.* Lombard 142
Luby *v.* Hudson Riv. R. 183
Lucas *v.* Bank 32
v. De la Cour 259
Lucey *v.* Ingram 287
Luckie *v.* Johnson 145
Lucy *v.* Ry. 311
Ludgater *v.* Love 198, 199
Ludwig *v.* Gillespie 261
Lufkin *v.* Mayall 101

Page

Lumley *v.* Gye 209, 224, 370, 371, 372
Lupton *v.* White 113
Lyell *v.* Kennedy 46, 48
Lynch *v.* Fallon 102
v. Met., etc. R. 210
Lyon *v.* Kent 34
v. Mitchell 102
v. Pollock 136

M.

Maanss *v.* Henderson 235
McArthur *v.* Times Printing Co. 44
MacBeath *v.* Ellis 78
Macbeath *v.* Haldimand 255
McCauley *v.* Brown 8, 218
McCaulley *v.* Jenney 254
McClay *v.* Hedge 100
Maclean *v.* Dunn 56
McClellan *v.* Reynolds 255
McClintock *v.* South Penn. Oil Co. 53
McCollin *v.* Gilpin 252
McConnell *v.* East Point Land Co. 177
McCord *v.* Western Union Tel. Co. 207, 208
McCormick *v.* Joseph 189
McCracken *v.* San Francisco 42, 53, 56, 60
McCrary *v.* Ruddick 26, 93
McCready *v.* Thorn 74, 138, 157
McCullough *v.* Moss 143
McCurdy *v.* Rogers 231
McCutcheon *v.* People 326
McDaniels *v.* Flower Brook Mfg. Co. 170, 238
McDonald *v.* Maltz 102
v. Massachusetts General Hospital 319
McDowell *v.* Laer 160
v. Simpson 56
McElrath *v.* United States 215
McGilvray *v.* West End Ry. 310
McGraft *v.* Rugee 94
MacGregor *v.* Gardner 79
Machine Co. *v.* Insurance Co. 143
McIlhenny *v.* Wilmington 317
McInerney *v.* D. & H. Canal Co. 283
McIntyre *v.* Park 56
McIntyre *v.* Trumbull 318

Page

Mackall *v.* Rachford 373
Mackay *v.* Commercial Bank 199
McKensey *v.* Edwards 244
McKenzie *v.* British Linen Co. 59
v. Nevius 94
McKindly *v.* Dunham 145
McLaren *v.* Hall 54
McLeod *v.* Evans 225
McManus *v.* Crickett 16, 306
M'Namee *v.* Hunt 278
McNaughton *v.* Moore 84
McNeil *v.* Boston Chamber of Commerce 36
v. Tenth N. B. 217
McNeilly *v.* Continental Life Ins. Co. 80
McNevins *v.* Lowe 122
McNutt *v.* Livingston 318
M'Peck *v.* Central Vt. R. 354
McPherson *v.* Cox 155
McTaggart *v.* Eastman's Co. 337
Mad River, etc. R. *v.* Barber 333
Madden *v.* Jacobs 83
Maddox *v.* Brown 297
Maddux *v.* Bevan 155
Madison R. *v.* Bacon 333
Mahoney *v.* Dore 353, 354, 355
Maier *v.* Randolph 300, 302
Maisenbacker *v.* Society Concordia 313
Maitland *v.* Martin 103, 104
Makepeace *v.* Rogers 114
Malcolm *v.* Scott 257
Mali *v.* Lord 309
Mallach *v.* Ridley 309
Mallory *v.* Mariner 146
Mallough *v.* Barber 109
Maloney *v.* Bartley 266
Mandeville *v.* Welch 114
Manhattan Life Ins. Co. *v.* Forty-second Street, etc. R. 185, 206
Mann *v.* Delaware & H. C. Co. 345
Manning *v.* Hogan 352
v. Wells 74
Manson *v.* Baillie 93
Maple *v.* R. Co. 169
Mare *v.* Charles 246
Marfield *v.* Goodhue 107
Margarite Mitchell, The 79
Maria, The 287
Markey *v.* County of Queens 315
Markham *v.* Jaudon 152
Marquette, etc. R. *v.* Taft 75

	Page
Marschall *v.* Aiken	63
Marsh *v.* Hand	9
v. Herman	352
v. Jelf	153
Martin *v.* Almond	238
v. Farnsworth	156
v. Great Falls Mfg. Co.	127
v. Louisville, etc. R.	361
v. Moulton	110
v. Payne	369
v. Pope	94
v. Schoenberger	100
v. Temperley	287
v. Webb	65
Martini *v.* Coles	150, 222
Marvin *v.* Brooks	7, 114
v. Ellwood	112
Mason *v.* Joseph	116
v. Richmond, etc. R.	340, 356
v. Waite	217
Massey *v.* Banner	113
v. Taylor	98
Mather *v.* Rillston	341, 352
Matheson *v.* Kilburn	45
Matter of Goodell	154
Matthews *v.* Dubuque Mattress Co.	240, 242
v. Menedger	94
Matthiessen, etc. Co. *v.* McMahon's Adm'r	30, 84
Mattison *v.* L. S. & M. S. Ry.	358
May *v.* Bliss	298, 300, 302
Mayer *v.* Dean	198
v. Hutchinson Building Co.	364, 365
Mayor *v.* Eschbach	135
Mayor, etc. of Salford *v.* Lever	34, 115, 148, 223, 224
Means *v.* Swormstedt	242
Mechanics' Bank *v.* Bank of Columbia	156, 245, 248
Meehan *v.* Forrester	51
Meek *v.* Wendt	232
Meier *v.* Morgan	276
Melledge *v.* Boston Iron Co.	243
Melvin *v.* Lamar Ins. Co.	146
Mentz *v.* Lancaster F. Ins. Co.	143
Merchants' Bank *v.* State Bank	69, 155, 156
Merchants' N. B. *v.* Goodman	120
Merrick *v.* Wagner	146
Merrill *v.* Kenyon	169, 170
v. Wilson	
v. Witherby	235
Merritt *v.* Merritt	84
Mersey Docks *v.* Gibbs	320
Metcalf *v.* McLaughlin	266
v. Williams	46, 240, 241
Meyer *v.* Hanchett	110
v. Ill. Cent. R.	339
v. Ry.	311
v. Stone	145
Michael *v.* Jones	232, 254
v. Stanley	356
Michaelson *v.* Denison	357
Michoud *v.* Girod	110
Mildred *v.* Maspons	174
Milford *v.* Water Co.	58
Mill *v.* Hawker	263
Miller *v.* Goddard	100
v. Lea	174
v. Minnesota & Northwestern Ry.	283
v. New York, etc. R.	9
v. Phœnix Ins. Co.	143
v. R. R. Co.	224
v. Roach	242
v. State Bank of Duluth	261
Mills *v.* Mills	39
Millville, etc. Ins. Co. *v.* Mechanics', etc. Ass'n	143
Minett *v.* Forrester	86
Minnesota, etc. Co. *v.* Montague	136
Minturn *v.* Main	262
Misa *v.* Currie	94
Missouri Pac. R. *v.* Williams	340
Mitchell *v.* Crassweller	297
v. Harmony	362, 366
Mitchum *v.* Dunlap	178
Mobile, etc. R. *v.* Clanton	361
v. Godfrey	343, 344
v. Jay	50
Moffatt *v.* Bateman	122
Mohr *v.* Miesen	104, 105
Moir *v.* Hopkins	298, 300, 302
Moley *v.* Brine	28
Monsseaux *v.* Urquhart	33
Montagu *v.* Forwood	173
Montaignac *v.* Shitta	206
Monticello *v.* Kendall	255
Montreal Assurance Co. *v.* M'Gillivray	128

	Page
Montross *v.* Eddy	102
Moon *v.* Richmond, etc. R.	338
Moore *v.* Appleton	104
v. Fitchburg R.	266
v. Fox	37
v. McKinney	318
v. Penn	177
v. Robinson	267
v. Shields	256
v. Stone	77
v. Railroad	340
Moores *v.* Citizens' Nat. Bk.	204, 206
Moors *v.* Kidder	221
Moran *v.* Dawes	369
v. Dunphy	372, 373, 374
Morgan *v.* East	153
v. Railroad	63
v. Smith	9
v. Vale of Neath R.	332
Morier *v.* St. Paul, etc. R.	298, 305
Morris *v.* Cleasby	121
v. Preston	216
v. Salberg	155
Morse *v.* Conn. Riv. R.	182
v. State	327
Mortimore *v.* Wright	74
Morton *v.* Met. Ins. Co.	211
Moses *v.* Bierling	96
v. Stevens	101
Moss *v.* Livingston	246
Motley *v.* Head	84
Mott *v.* Consumers' Ice Co.	306
Moulton *v.* Bowker	139, 154
Mudgett *v.* Day	146
Mullens *v.* Miller	137
Muller *v.* Podir	94
Mulligan *v.* N. Y. & R. B. Ry.	210, 299, 308, 309
Mullins *v.* Collins	325, 326
Mulvehall *v.* Millward	369
Mulvehill *v.* Bates	297
Mundorff *v.* Wickersham	50
Munn *v.* Commission Co.	131, 132
Murphy *v.* New York, etc. R.	337
Murray *v.* Dwight	281, 335
v. South Carolina Railroad Company	332
v. Usher	362, 364
Muscott *v.* Stubbs	26
Mussey *v.* Beecher	136
v. Eagle Bank	156
Mussey *v.* Scott	170, 237
Mutual B. L. Ins. Co. *v.* Robison	144
Mutual Life Ins. Co. *v.* Hunt	29
Myerhoff *v.* Daniels	201

N.

Nagle *v.* McFeeters	94
Naltner *v.* Dolan	113
Narramore *v.* Cleveland, etc. Ry.	355, 357
Nash *v.* Mitchell	30
Nat. Bank *v.* Ins. Co.	225, 226, 227
National Bank of Commerce *v.* Chicago, etc. R.	207
National Cordage Co. *v.* Sims	8, 122
National Exchange Co. *v.* Drew	199
Nat. Life Ins. Co. *v.* Minch	60, 190
National Protective Ass'n *v.* Cumming	372
Nave *v.* First Nat. Bk.	177, 248
Neal *v.* Patten	179
Neilson *v.* James	109
Nelson *v.* Aldrich	141, 153
v. Cowing	182
v. Powell	162
Nelson Business College Co. *v.* Lloyd	308
Neufeld *v.* Beidler	254
Newall *v.* Tomlinson	256
Newberry *v.* Wall	35
Newbold *v.* Wright	219, 222
Newcomb *v.* Boston Protective Department	321
Newell *v.* Borden	33
v. Smith	116
New England R. Co. *v.* Conroy	338, 342
Newman *v.* Sylvester	254
New Market Savings Bank *v.* Gillet	244
New Orleans, etc. R. *v.* Norwood	283
N. Y., etc. Ins. Co. *v.* Ins. Co.	110
New York, etc. R. *v.* Lambright	342
v. Schaffer	358
New York Iron Mine *v.* Citizens' Bank	146
v. First N. B.	138, 143, 147
New York, L. E. & W. R. *v.* Steinbrenner	280
N. Y. Life Ins. Co. *v.* Statham	87

	Page
New York & N. H. R. *v.* Schuyler	195, 205, 206
New York Security & Trust Co. *v.* Lipman	220
New Zealand, etc. Co. *v.* Watson	119
Nicholls *v.* Diamond	247
Nichols *v.* Frothingham	177, 248
v. Mudgett	39
Nicholson *v.* Mouncey	317
Nickolson *v.* Knowles	112
Nickson *v.* Brohan	67, 129
Nims *v.* Mount Hermon Boys' School	60, 298, 301
Nix *v.* Texas, etc. R.	334, 340
Nixon *v.* Brown	217, 218
v. Palmer	137, 146
v. Selby, etc. Co.	343
Nobel's Exp. Co. *v.* Jones	266
Noecker *v.* People	326
Noice *v.* Brown	371
Nolte *v.* Hulbert	110
Nord Deutscher, etc. Co. *v.* Ingebregsten	341
Norfolk *v.* Worthy	172
Norrington *v.* Wright	101
Norris *v.* Kohler	296
North River Bank *v.* Aymar	136
Northern Pac. R. *v.* Babcock	356
v. Hambly	336
v. Herbert	342
v. Mares	354
Northwestern Distilling Co. *v.* Brant	171
Norton *v.* Herron	252
Norwalk Gaslight Co. *v.* Norwalk	275, 277
Noyes *v.* Landon	111
v. Loring	231, 232

O.

	Page
Oakes *v.* Cattaraugus Water Co.	44, 234
v. Mase	337
O'Brien *v.* Cunard Steamship Co.	285
Oceanic, etc. Nav. Co. *v.* Compania, etc. Espanola	361
O'Conner *v.* Insurance Co.	179
O'Connor *v.* Clopton	256
Odiorne *v.* Maxcy	147
Oelricks *v.* Ford	236
Ogden *v.* Hall	252
Oglesby *v.* Yeglesias	251
Ohio, etc. Ry. *v.* Stein	184
Okell *v.* Charles	247
Olcott *v.* Tioga R. R. Co.	245
O'Leary *v.* Marquette	317
Oliver *v.* Court	110
Olyphant *v.* McNair	142
O'Maley *v.* South Boston Gaslight Co.	353, 354, 355
O'Neil *v.* Behanna	373
Oom *v.* Bruce	262
Opie *v.* Serrill	123
Orton *v.* Scofield	110
Osborn *v.* Gillett	368
Osborne *v.* Knox	336
v. Morgan	264, 361
Oskamp *v.* Gadsden	182
Owen *v.* Cronk	256, 257
v. Gooch	230
Owings *v.* Hull	52
Owsley *v.* Montgomery, etc. R.	211
v. Philips	59
Oxford *v.* Crow	55

P.

	Page
Pack *v.* White	244
Packet Co. *v.* Clough	183
Padmore *v.* Piltz	157
Padwick *v.* Stanley	95, 114
Page *v.* Wells	108, 109, 361
Paice *v.* Walker	252
Paige *v.* Stone	235
Pain *v.* Sample	235
Painton *v.* Northern Cent. R.	351
Palk *v.* Force	103
Palmer *v.* Delaware & H. C. Co.	351
v. Hatch	141
v. Haverhill	93
Palmeri *v.* Manhattan Ry.	210, 299, 308
Panama, etc. Co. *v.* India Rubber Co.	224
Pape *v.* Westacott	107
Parcell *v.* McComber	100
Park *v.* N. Y. Cent., etc. R.	352
Parker *v.* Brancker	107, 150
v. Hill	38
v. McKenna	115
v. Smith	86

Page

Parker *v.* Winlow 252
Parks *v.* Ross 255
Parsons *v.* Winchell 266
Parton *v.* Crofts 152
Partridge *v.* White 48
Paterson *v.* Gandasequi 169, 235
Patrick *v.* Bowman 234
Patten *v.* Rea 297
Patterson *v.* Lippincott 28, 53, 233
v. Tash 219, 222
Pattison *v.* Jones 357
Paul *v.* Hummel 289
Paxton Cattle Co. *v.* First National Bank 44
Payne *v.* Leconfield 141, 153
v. Potter 141
Peabody *v.* Hoard 131
Peak *v.* Ellicott 225
Pearson *v.* Graham 86
Peck *v.* Harriott 135
Peebles *v.* Patapsco Guano Co. 200
Peel *v.* Shepherd 173
Peeples *v.* Ry. 310
Peine *v.* Webster 55
Pelham *v.* Hilder 139
Penfold *v.* Warner 135, 136
Peninsular R. *v.* Gary 75
Pennsylvania Co. *v.* McCaffrey 352
v. Roy 285
Pennsylvania R. *v.* Zink 356
Pentz *v.* Stanton 169, 172, 241, 249
People *v.* Clay 210
v. Denison 54
v. Globe Ins. Co. 86
v. Roby 325
v. Township Bk. 110
Perkins *v.* Boothby 143, 147
v. Evans 223
v. Smith 362
Perminter *v.* Kelly 33, 265
Perry *v.* Lansing 338
Peters *v.* Farnsworth 141
Peterson *v.* W. U. Tel. Co. 209
Petor *v.* Hague 182
Petril, The 337
Phelin *v.* Kenderdine 369
Phelps *v.* James 182
v. Sullivan 39
v. Wait 267, 362, 365
Philadelphia, etc. R. *v.* Cowell 42, 49
v. Howard 171

Page

Philadelphia, etc. R. *v.* Larkin 314
v. Quigley 210, 310
Philadelphia and Reading R. *v.* Derby 123, 305, 307
Phillips *v.* Barnett 290
v. Mercantile Nat. Bk. 203, 207
v. Moir 136, 150
Philpot *v.* Bingham 28
Phœnix Ins. Co. *v.* Munger 143
Pickard *v.* Sears 63, 64
Pickering *v.* Busk 8, 15, 66, 130, 217, 218, 222
Pickert *v.* Marston 139, 141, 152
Pickett *v.* Pearsons 61
Pierce *v.* Johnson 249
Pike *v.* Balch 75
v. Douglass 48
v. Ongley 250, 252
Pinkham *v.* Crocker 139, 150
Pitney *v.* Glen's Falls Ins. Co. 143
Pittman *v.* Sofley 190
Pitts *v.* Mower 172
Pittsburg, etc. R. *v.* Gazzam 45
v. Pillow 311
v. Shields 311
v. Sullivan 284
Plant *v.* Thompson 151
v. Woods 372
Poillon *v.* Secor 62
Pole *v.* Leask 16, 129, 132, 136, 137
Polhill *v.* Walter 232
Pollacek *v.* Scholl 174
Pollard *v.* Gibbs 38, 55
v. Vinton 202, 206
Pollock *v.* Cohen 58
v. Stables 130
Poulton *v.* London, etc. Ry. 210
Pow *v.* Davis 232, 233
Powell *v.* Construction Co. 283
v. Oleson 165
Power *v.* First N. B. 119
Powers *v.* Briggs 244
v. Mass. Homœopathic Hospital 319
v. New York R. 353, 354
Powles *v.* Page 191
Prather *v.* United States 326
Prentice Co. *v.* Page 221
Preston *v.* Hill 155
v. Prather 123
Prestwich *v.* Poley 155

	Page
Price *v.* Taylor	239, 242
Prickett *v.* Badger	96
Priestley *v.* Fernie	169
v. Fowler	332
Prins Hendrik, The	287
Pritchard *v.* Hitchcock	361
Probst *v.* Delamater	351
Proctor *v.* Bennis	131
Prosser *v.* Coots	318
Protection Life Ins. Co. *v.* Foote	31
Providence *v.* Miller	255
Purdy *v.* Rome, etc. Railroad Company	349
Putnam *v.* French	141, 145
v. R. Co.	311

Q.

Quarman *v.* Burnett	281
Queen *v.* Parr	99
v. Stephens	328
Quinlan *v.* Providence, etc. Co.	144
Quinn *v.* Complete Electric Const. Co.	10
v. Power	297, 305
v. R.	284

R.

Rabone *v.* Williams	173
Ragan *v.* Chenault	56
Ragon *v.* Toledo R.	353
Ragsdale *v.* Land Co.	9
Railroad *v.* Spence	340
Raisin *v.* Clark	110
Raleigh *v.* Atkinson	87, 88
Ralli *v.* Troop	288
Ramazotti *v.* Bowring	173
Randall *v.* Kehlor	150
Randell *v.* Trimen	232, 233
Rathbun *v.* Snow	65, 147
Ray *v.* Powers	32
Rayner *v.* Grote	259, 260
Re Devala Provident, etc. Co.	179
National Coffee Palace Co.	232
Pickering's Claim	170
Read *v.* Anderson	87, 90, 104
v. East Providence Fire Dist.	279
v. Legard	74
Reagan *v.* Casey	281
Rechtscherd *v.* Accommodation Bank	107, 361
Reddie *v.* Scoolt	370
Redgrave *v.* Hurd	196
Reece *v.* Kyle	103
Reed *v.* Home Savings Bank	210, 309
Reedie *v.* London & N. W. Ry.	278
Rees *v.* Pellow	80
Reese *v.* Medlock	136
Reeve *v.* First N. B.	171, 240, 242
Reg. *v.* Cooper	210
v. Holbrook	328
v. Huntley	361
Rendell *v.* Harriman	239, 242
Renshaw *v.* Creditors	89
Renwick *v.* Bancroft	116
Reuben *v.* Swigart	276
Rex *v.* Almon	328
v. Dixon	326
v. Gutch	210, 328
v. Medley	328
v. Walter	210, 328
Reynolds *v.* Peapes	236
Rhoades *v.* Blackiston	261
Rhoda *v.* Annis	201
Rhodes *v.* Forwood	99
Rice *v.* Gove	179
v. Manley	209, 372
v. Peninsular Club	147
v. Wood	102
v. Yocum	265
Rice, etc. Co. *v.* Bank	174
Richardson *v.* Carbon Hill Coal Co.	285, 319
v. Eagle Machine Works	97
v. Kimball	61
Richmond, etc. R. *v.* Norment	356
v. Williams	334
Ricks *v.* Yates	99
Riddle *v.* Backus	37
Riehl *v.* Evansville Foundry Ass'n	226
Right *v.* Cuthell	58
Rimell *v.* Sampayo	130
Ripley *v.* Chipman	100
Rippe *v.* Stogdill	114
Risbourg *v.* Bruckner	61
Ritchie *v.* Waller	297, 305
Roach *v.* Turk	265
Robb *v.* Green	111
Roberts *v.* Johnson	266

Page

Roberts *v.* N. W. Nat. Ins. Co. 179
v. Ogilby 24, 112
v. R. Co. 344
v. Rockbottom 37
Robertson *v.* Cloud 80
v. Levy 146
v. Sichel 317
Robins *v.* Bridge 230
Robinson *v.* Bird 265
v. Davison 85
v. Kanawha Valley Bank 243, 247
v. Mollett 111, 139
v. Rohr 317
v. Rutter 262
v. Webb 267
Robson *v.* Drummond 117, 159
Roca *v.* Byrne 225
Rochester Lantern Co. *v.* Stiles 117, 159
Rockford, etc. R. *v.* Sage 44
Rodick *v.* Coburn 141
Roehm *v.* Horst 97
Roesner *v.* Herman 348
Roger *v.* Blackwell 29
Roland *v.* Coleman 88
Roosevelt *v.* Doherty 174
Rossiter *v.* Rossiter 132
v. Trafalgar Life Assurance Co. 116
Rounds *v.* Delaware, etc. R. 300, 306, 307
Rourke *v.* White Moss Colliery Co. 280, 283
Rowe *v.* Rand 80, 84, 261, 262
Royal Ins. Co. *v.* Beatty 49
Royce *v.* Allen 249
Rudasill *v.* Falls 50
Rudd *v.* Matthews 59
Rudgeair *v.* Reading Traction Co. 308
Ruffner *v.* Hewitt 103
Ruggles *v.* American Central Ins. Co. 143
Rumsey *v.* Briggs 243
Rupp *v.* Sampson 110
Ruse *v.* Wabash W. Ry. 340
Russell *v.* Hankey 109
v. Hudson Riv. R. Co. 334
v. Lawton 318
v. Slade 37
Rust *v.* Eaton 127
Rutland, etc. R. *v.* Lincoln 48

Page

Ryan *v.* Cumberland R. 332, 364
v. Tudor 146, 192

S.

Sadler *v.* Henlock 274
v. Leigh 172, 260, 261
Sage *v.* Shepard & Morse Lumber Co. 221
St. Andrew's Bay Land Co. *v.* Mitchell 31
St. Johnsbury, etc. R. Co. *v.* Hunt 224, 368
St. Louis, etc. R. *v.* Larned 207
v. Weaver 182
v. Yonley 278
St. Margaret's Burial Board *v.* Thompson 116
Salacia, The 252
Saladin *v.* Mitchell 152
Salomons *v.* Pender 102
Salter *v.* Howard 371
Saltus *v.* Everett 216
Samo *v.* Ins. Co. 152
Samuelian *v.* American Tool Co. 284
Sanborn *v.* Neal 255
Sanders *v.* Partridge 237
Sands *v.* Child 263
Sanger *v.* Warren 171
Sargeant *v.* Clark 155
Sargent *v.* Mathewson 370
Satterfield *v.* Malone 189
Saunderson *v.* Griffith 45
Savage *v.* Gibbs 255
v. Walthew 361
Saveland *v.* Green 49, 104
Savings Fund Soc. *v.* Savings Bank 130
Saxton *v.* Hawksworth 353
Sayre *v.* Nichols 116
Scanlan *v.* Keith 242
Schendel *v.* Stevenson 166
Schip *v.* Pabst Brewing Co. 275
Schlater *v.* Winpenny 80
Schmaltz *v.* Avery 163, 176, 259, 260
School District *v.* Ætna Ins. Co. 54
Schultz *v.* Griffin 138, 141
Scidmore *v.* Smith 370
Scott *v.* Central Park, etc. R. 308, 311

	Page
Scott *v.* Maier	25, 93
v. Surman	162, 226
Scribner *v.* Collar	102
v. Flagg Mfg. Co.	37
Scrimshire *v.* Alderton	164
Scully *v.* Sully's Ex'r	93
Seagar *v.* Slingerland	370
Seaman *v.* Koehler	338
Searle *v.* Parke	300
Sebeck *v.* Plattdeutsche Volkfest Verein	275
Secord *v.* Ry.	284
Secretary of State for India *v.* Kamachee Boye Sahaba	366
Seeberger *v.* McCormick	231, 232
Seiple *v.* Irwin	130, 138
Semenza *v.* Brinsley	174
Seton *v.* Slade	78
Sevier *v.* Birmingham, etc. R.	75
Seymour *v.* Cummins	317
v. Greenwood	306
Shack *v.* Anthony	176, 258
Shafer *v.* Phœnix Ins. Co.	189
Sharman *v.* Brandt	259
Sharp *v.* Jones	213
Shaver *v.* Penn. Co.	349
Shearer *v.* Evans	267
Sheehan *v.* R. Co.	343
Sheffer *v.* Montgomery	227
Sheffield *v.* Watson	171
Sheldon *v.* Cox	186
v. Darling	246
Shelton *v.* Johnson	93
v. Springett	74
Shepard *v.* Sherin	256
Sherman *v.* Rochester, etc. R.	334
Sherrod *v.* Langdon	62
Sherwood *v.* Stone	121
Shiells *v.* Blackburne	122
Shisler *v.* Vandike	59
Shoe Co. *v.* Saxey	372
Short *v.* Millard	77, 102
Shuey *v.* United States	80
Sibbald *v.* Bethlehem Iron Co.	151
Simmonds *v.* Moses	231, 232
Simmons *v.* London Joint Stock Bank	147
Simon *v.* Brown	65
v. Motivos	249
Simonds *v.* Heard	255
Simpson *v.* Garland	244
Simpson *v.* Lamb	99
v. Walby	119
Sims *v.* Miller	150
Singer Mfg. Co. *v.* Rahn	8, 19, 274
Sioux City, etc. R. *v.* First Nat. Bk.	207
Skiff *v.* Stoddard	139, 152
Skipper *v.* Clifton Mfg. Co.	313
Slater *v.* Jewett	343, 352
Slater Woolen Co. *v.* Lamb	31
Slawson *v.* Loring	245, 246
Sleath *v.* Wilson	297
Sloan *v.* Central Iowa Ry. Co.	76
Small *v.* Attwood	131
Smalley *v.* Morris	182, 201
Smart *v.* Sanders	87, 88, 150
Smith *v.* Backus	356
v. Bailey	196, 296
v. Baker	354, 355
v. Benick	278
v. Binder	256
v. Clews	140, 218
v. Cologan	59
v. Hodson	50
v. Kelly	256
v. Kerr	38
v. Kidd	146
v. Lane	80
v. Leveaux	95
v. Lyons	262
v. McGuire	140
v. New York, etc. R. (19 N. Y. 127)	337
v. N. Y. Cent. & H. R. R. (78 Hun, 524)	312
v. Oxford Iron Co.	341, 343
v. Price	109
v. Rice	141
v. Sleap	256
v. Sorby	148, 224
v. Steele	288, 335
v. Tracy	141, 152
v. Utley	366
v. Water Comm.	191
v. Webster	300
Smout *v.* Ilbery	232, 234, 253
Snell *v.* Pells	112
Snow *v.* Hix	254
Snowdon *v.* Davis	256
Soltau *v.* Gerdau	221
Somerville *v.* Hawkins	357

	Page
Soughegan Nat. Bk. *v.* Boardman	247
South Bend, etc. Co. *v.* Dakota, etc. Ins. Co.	143
Southcote *v.* Stanley	361
Southerne *v.* Howe	15, 67
Southwell *v.* Bowditch	230, 250
Spackman *v.* Evans	54
Spalding *v.* Rosa	85
Sparks *v.* Dispatch Transfer Co.	171, 241
Spittle *v.* Lavender	61, 230
Spofford *v.* Hobbs	55
Spooner *v.* Browning	129, 130
Sprague *v.* Gillett	142
Spraights *v.* Hawley	265
Spurr *v.* Cass	172
Stables *v.* Eley	296
Stagg *v.* Elliott	137
Stainsby *v.* Frazer's Co.	44
Standard Oil Co. *v.* Gilbert	81
Stanford *v.* McGill	97
Stanley *v.* Schwalby	366
Stanton *v.* Embrey	103
Staples *v.* Schmid	210, 308
Stark *v.* Parker	100
State *v.* Fredericks	200
v. McCance	325, 327
v. Mason	328
v. Moore	318
Steamboat Co. *v.* Joliffe	72
Stearns *v.* Doe	138
Stebbins *v.* Walker	173, 175
Steele Smith Grocery Co. *v.* Potthast	169
Stephens, The John G.	288
Stephenson *v.* Southern Pac. Co.	313
Stevens *v.* Fitch	215
v. Ludlum	64, 65
v. Midland R.	267
v. Wilson	221
Stevenson *v.* Mortimer	215, 262
Stewart *v.* Brooklyn, etc. R.	310
v. Kennett	57
v. Stone	83
v. Woodward	143
Stier *v.* Ins. Co.	89
Stiles *v.* Western R.	182
Stillwell *v.* Staples	52
Stimson *v.* Whitney	63
Stinchfield *v.* Little	171, 238
Stoddart *v.* Key	82
Stone *v.* Cartwright	365
v. Hills	297
Storer *v.* Eaton	108, 111
Storey *v.* Ashton	297
Stout *v.* Ennis	39
Stowell *v.* Eldred	237
Stranahan *v.* Coit	307, 311
Strasser *v.* Conklin	48
Strauss *v.* City of Louisville	278
v. Francis	127, 139
v. Meertief	96, 98
Street Ry. *v.* Bolton	293
Strong *v.* High	109
Stuart *v.* Simpson	370
Stubbing *v.* Heintz	127
Sturdivant *v.* Hull	239, 242
Suart *v.* Haigh	231
Suit *v.* Woodhall	187
Sullivan *v.* Miss., etc. R.	333
v. Shailer	176
Sumner *v.* Conant	31
v. Conhaim	97
v. Reicheniker	81, 98
Sutherland *v.* Ingalls	321
v. Troy, etc. R.	345
v. Wyer	98
Sutton *v.* Spectacle Makers Company	39
Svenson *v.* Atlantic Mail Steamship Co.	296, 338
Swan *v.* Nesmith	121
Swazey *v.* Union Mfg. Co.	76
Sweeney *v.* Berlin, etc. Co.	353, 356
Sweeting *v.* Pearce	139
Swentzel *v.* Penn. Bank	124
Swift *v.* Jewsbury	263, 264
Swim *v.* Wilson	265
Swinarton *v.* Le Boutillier	301
Swire *v.* Francis	199
Sydnor *v.* Hurd	252
Sykes *v.* Howarth	309

T.

Taft *v.* Brewster	170, 238
Tagg *v.* Bowman	114
Taintor *v.* Prendergast	164, 172, 173
Talbot *v.* Bowen	34
v. National Bank	215
Talcott *v.* Chew	150

	Page
Talcott *v.* Wabash R.	172
Talmage *v.* Bierhause	140
Tannatt *v.* Rocky Mt. Nat. Bk.	241
Taplin *v.* Florence	88
Tarrant *v.* Webb	332
Tarry *v.* Ashton	278
Tasker *v.* Shepherd	84
Tatam *v.* Reeve	104
Tate *v.* Hyslop	187
Taussig *v.* Hart	34, 110
Taylor *v.* Brewer	93
v. Conner	55
v. Green	198
v. Nostrand	232
v. Plumer	226
v. Robinson	58, 60
v. Starkey	141
Teed *v.* Beere	114
Temperton *v.* Russell	224, 372
Temple *v.* Pomroy	143, 146, 147
Tenant *v.* Elliott	113
Terre Haute, etc. R. *v.* McMurray	75
v. Stockwell	75
Terrill *v.* Rankin	366
Terry *v.* Birmingham N. Bk.	102
Tewksbury *v.* Spruance	34, 110
Texas & P. Ry. *v.* Scoville	313
Thacker *v.* Hardy	87, 104
Thayer *v.* Meeker	179
Thomas *v.* Atkinson	169
v. City N. B.	48
v. Joslin	38
Thompson *v.* Barnum	216
v. Havelock	110
v. Kelly	153, 262
v. Lowell, etc. Ry.	277
Thomson *v.* Davenport	166, 167, 235
Thorne *v.* Deas	27, 40, 122, 360, 363
Thorold *v.* Smith	145
Thorpe *v.* N. Y. C. & H. R. R.	285
Tier *v.* Lampson	80, 82
Tifft *v.* Tifft	289
Tillier *v.* Whitehead	32
Timberlake *v.* Thayer	100
Timpson *v.* Allen	65
Todd *v.* Emly	33, 235
Toledo, etc. Ry. *v.* Harmon	312
v. Mylott	75
Tome *v.* Parkersburg Branch R.	206
Tool Co. *v.* Norris	102
Topham *v.* Braddick	114
Towle *v.* Dresser	28
v. Leavitt	133, 141
Townsend *v.* Corning	53
Townsley *v.* Bankers' Life Ins. Co.	111
Trainer *v.* Morison	145
v. Trumbull	72
Traveller' Ins. Co. *v.* Edwards	65
Traver *v.* Garlington	241, 243
Trentor *v.* Pothen	190
Trickett *v.* Tomilson	127
Triggs *v.* Jones	61, 95
Trist *v.* Child	39, 102
Trueblood *v.* Trueblood	28, 54, 55
Trueman *v.* Loder	81
Trust Co. *v.* Floyd	231, 232
Tubbs *v.* Dwelling House Ins. Co.	144
Tucker *v.* St. Louis, etc. Ry.	75
v. Taylor	94
Tucker Mfg. Co. *v.* Fairbanks	240, 242, 246
Turner *v.* Goldsmith	83
Turnpike Co. *v.* Green	309
Turpin *v.* Bilton	109
Tuttle *v.* Swett	36
Tweddle *v.* Atkinson	159

U.

Udell *v.* Atherton	195, 199, 200
Uhlman *v.* N. Y. Life Ins. Co.	7
United States *v.* Bartlett	215
v. Buchanan	139
v. Dempsey	215
v. Grossmayer	33, 86
v. Jarvis	98
v. Parmele	164
v. Pinover	256
United States Bank *v.* Burson	145
v. Davis	191
v. Lyman	177, 258
United States Tel. Co. *v.* Gildersleeve	261
Union Bank *v.* Campbell	191
Union, etc. Bk. *v.* Gillespie	226
Union Canal Co. *v.* Loyd	191
Union Gold Min. Co. *v.* Rocky Mt. N. B.	191
Union Mut. Ins. Co. *v.* Wilkinson	144
Union N. B. *v.* German Ins. Co.	187
Union Pacific Ry. *v.* Artist	319, 320

Page

Union Pacific Ry. *v.* Doyle 334, 338, 339
v. Erickson 336
Updike *v.* Ten Broeck 37
Upton *v.* Archer 39
v. Suffolk County Mills 137, 141

V.

Van Alen *v.* Am. Nat. Bk. 225
Van Antwerp *v.* Linton 364
Van Arman *v.* Byington 25, 93
Vance *v.* Erie R. 211
Van Deusen *v.* Sweet 29
Van Tassell *v.* Manhattan Eye and Ear Hospital 319
Vanuxem *v.* Bostwick 100
Varnum *v.* Evans 238
Vater *v.* Lewis 248
Vawter *v.* Baker 237
Vegelahn *v.* Guntner 373, 374
Venning *v.* Bray 79
Verona Central Cheese Co. *v.* Murtaugh 326
Very *v.* Levy 130
Vescelius *v.* Martin 143
Vicksburg, etc. Railroad Co. *v.* O'Brien 184
Viele *v.* Germania Ins. Co. 143
Vinton *v.* Baldwin 94, 96
Violett *v.* Powell 176
Vischer *v.* Yates 217
Vrooman *v.* Turner 159
Vusler *v.* Cox 73

W.

Wabash R. *v.* Kelley 285, 321
v. McDaniels 341, 351, 352
Waddell *v.* Mordecai 250
Waddill *v.* Sebree 251
Wadsworth *v.* Sharpsteen 29
Wagner *v.* Jayne Chemical Co. 356
Wagoner *v.* Watts 38
Wait *v.* Borne 141
Walker *v.* Baird 366
v. Bank 247, 252
v. Cronin 209, 224, 372, 374
v. Guarantee Ass'n 361
v. Herring 153

Page

Walker *v.* Osgood 110
v. Rostron 257
v. Swartwout 255
Wall *v.* Delaware, etc. R. 345
Wallace *v.* Bank 146
v. Central Vermont R. 355
v. Finberg 266, 310
v. Floyd 25, 92
Wallis Tobacco Co. *v.* Jackson 137, 143
Walls *v.* Bailey 139
Walsh *v.* Fisher 99
v. Whitcomb 87
Walter *v.* James 52
Walton *v.* N. Y., etc. Co. 298
Wambole *v.* Foote 85
Waples *v.* Hastings 28
Warax *v.* Cincinnati, etc. R. 361, 365
Ward *v.* Evans 145
v. St. Vincent's Hospital 319
v. Smith 33, 87, 109, 145
v. Williams 49
Warder *v.* White 176
Ware *v.* Morgan 254
Warlow *v.* Harrison 253
Warner *v.* M'Kay 174
v. Martin 141, 150, 219
v. Southern Pac. R. 313
Warr *v.* Jones 232, 233
Warren *v.* Hewitt 103
v. Holbrook 7, 114
Warwick *v.* Slade 79
Wash *v.* Trustees 318
Washburn *v.* Nashville, etc. R. R. Co. 31
Washington Gas Light Co. *v.* Lansden 210
Washington, etc. R. *v.* McDade 351
Water Company *v.* Ware 277
Watkins *v.* De Armond 74
Watson *v.* King 89
v. Swan 45
v. Union Iron Co. 113
Watt *v.* Brookover 155
Watteau *v.* Fenwick 142, 143, 164, 166, 167
Watts *v.* Kavanagh 80
Weare *v.* Gove 231
v. Williams 136
Webb *v.* Smith 182
Weber *v.* Brooklyn, etc. R. 308, 311
v. Weber 263, 264, 362

	Page
Weed *v.* Adams	150
v. Panama R.	305
Weeks *v.* Holmes	93
Weisbrod *v.* Chicago, etc. R.	30, 31
Weiss *v.* Whittemore	267
Welch *v.* Maine Cent. R.	293
Wells & F. Co. *v.* Gortorski	355
West Jersey & Seashore R. *v.* Welsh	299, 303, 304
West St. Louis Sav. Bk. *v.* Shawnee County Bk.	156
Western Bank *v.* Addie	200
Western, etc. Ry. *v.* Bishop	348
Western Mortg. & Invest. Co. *v.* Ganzer	190
Western Pub. House *v.* Dist. Tp. of Rock	45
Western Trans. Co. *v.* Barber	112, 221
Westfield Bank *v.* Cornen	191
Weston *v.* Davis	93
Wetherbee *v.* Partridge	277
Wheatly *v.* Miscal	101
Wheeler *v.* McGuire	131, 137, 142
v. Nevins	38
v. Wason Mfg. Co.	352
Wheeler, etc. Co. *v.* Aughey	48
v. Boyce	314
v. Givan	141, 150
Whelan *v.* Reilly	146
Whipple *v.* Whitman	146, 155
White *v.* Equitable, etc. Union	39
v. Fuller	152
v. Madison	231
v. Miller	181, 182
v. Nellis	369
v. Owen	223
v. Procter	118, 153
v. Sawyer	200, 267
v. Skinner	231
Whitehead *v.* Greetham	40, 122, 360
v. Reddick	238
v. Taylor	57
v. Tuckett	15, 127, 132
Whiteman *v.* Hawkins	109
Whiteside *v.* United States	135
Whitfield *v.* Lord Le Despencer	263, 362
v. Paris	317
Whitford *v.* Laidler	238, 254
Whiting *v.* Mass., etc. Ins. Co.	43
Whitney *v.* Dutch	28
v. Martine	108, 109
v. Merchants' Union Exp. Co.	107
v. Wyman	44, 230, 234
Whittaker *v.* D. & H. C. Co.	341, 352
Whittenbrock *v.* Bellmer	48
Wichita Bank *v.* Atchison, etc. R.	207
Wick China Co. *v.* Brown	372
Wickham *v.* Wickham	121
Widrig *v.* Taggart	34, 101
Wiggin *v.* St. Louis	278
Wild *v.* Bank	156
Wilkinson *v.* Coverdale	360
v. Heavenrich	37, 53
Wilks *v.* Back	170, 237
Willcox *v.* Arnold	235
Willcox, etc. Co. *v.* Ewing	8
William *v.* Koehler	299
Wm. Lindeke Land Co. *v.* Levy	165
Williams *v.* Evans	153
v. Innes	180
v. Johnston	146
v. McKay	124, 125
v. Merle	263
v. Millington	262
v. North China Insurance Co.	43
v. Planters' Ins. Co.	211
v. Pullman Palace Car Co.	285, 301
v. Robbins	241
v. School District	36
v. Second N. B.	240
v. Stevens	115
v. Walker	145
v. Williams	113
v. Woods	116
Williamson *v.* Barbour	114
v. Barton	230, 235
v. Cambridge R.	183
v. Louisville Industrial School	320
Wilson *v.* Beardsley	133
v. Board of Education	101
v. Brett	122, 360
v. Dame	95
v. Edmonds	26
v. Ford	73
v. Hart	162
v. Poulter	50
v. Tumman	42, 45, 46
v. West Hartlepool, etc. Ry.	54
v. Wilson	107

	Page
Wiltse *v.* State Bridge Co.	298
Wiltshire *v.* Sims	141, 152
Winchester *v.* Howard	175
Wing *v.* Glick	255
Winsmore *v.* Greenbank	371
Wirebach *v.* First Nat. Bk.	29
Wisconsin *v.* Torinus	54, 60
Wisconsin Central R. *v.* United States	215
Wise *v.* Ry. Co.	310
Wishard *v.* McNeill	142
Wolf *v.* Howes	99
v. Studebaker	98
Wolfe *v.* Pugh	200, 201
Wolff *v.* Koppel	121
Wood *v.* Baxter	253
v. Farnell	318
v. Goodridge	238
v. McCain	60
v. Moriarty	160
Woodman *v.* Met. R. Co.	9
Woodward *v.* Suydam	61
v. Washburn	368
Woolfe *v.* Horne	253
Worden *v.* Humeston, etc. R. Co.	183
Workman *v.* Wright	59
Worrall *v.* Munn	38
Worthington *v.* Cowles	235
v. Waring	358
Wright *v.* Boynton	117
v. Cabot	174
Wright *v.* Central R. Co.	108
v. Crompton	365
v. Dannah	35
v. Davidson	7
v. Eaton	61
v. New York Cent. R.	334, 336
v. Wilcox	16, 306
Wyllie *v.* Palmer	284

X.

Xenos *v.* Wickham	152

Y.

Yale *v.* Eames	147
Yates *v.* Brown	287
Y. B. (34 & 35 Edw. I.)	162
Y. B. (7 H. IV. 34 pl. 1)	42
Yerrington *v.* Green	100
York *v.* Chicago, etc. R.	284
Young *v.* Cole	139, 141
v. Schuler	251
v. Stevens	29

Z.

Zerrahn *v.* Ditson	92

BOOK I.

PRINCIPAL AND AGENT.

THE LAW OF AGENCY.

INTRODUCTION.

CHAPTER I.

PRELIMINARY TOPICS.

§ 1. Representation in the law of obligation.

Legal obligations are either primary antecedent obligations or secondary substituted obligations. The obligation to fulfil a contract or the obligation not to assault another, is primary. The obligation to pay damages for not fulfilling a contract, or for assaulting another, is secondary or substituted, and arises only as a consequence of the breach of the primary one.

The primary obligations are imposed either by one's voluntary undertaking or by the law, irrespective of one's volition, upon grounds of public policy or utility.[1] Usually the voluntary undertaking originates in an offer or a representation made to another person and acted upon by him. Thus a contract or a gratuitous undertaking or a representation may, when acted upon by another person, impose an obligation which could not have existed but for the obligor's voluntary act. On the other hand, the obligation not to assault or defame another, or not to convert another's goods, is imposed upon every man in society without any act or consent of his.

The secondary substituted obligations arise from an act or omission resulting in a breach of a primary obligation. If

[1] Voluntary primary obligations have been termed "recusable obligations," while involuntary primary obligations have been termed "irrecusable obligations." Wigmore, 8 Harv. Law Rev. 200; Harriman on Cont. p. 6.

the primary obligation was voluntary, it may have been a contract, a representation, or an undertaking either not amounting to contract or extending beyond it. In the first case we call the failure to fulfil the obligation a breach of contract; in the second, misrepresentation, fraud, or deceit;[1] in the third, negligence. If the primary obligation was an involuntary one, we call the breach of it a tort, and we have various special names for these torts, as assault, defamation, conversion, negligence, etc.

Most of the things which a man may do in person he may do through a representative; accordingly, he may create a voluntary primary obligation through a representative, or he may through a representative commit a breach of a primary obligation, and thus impose upon himself a secondary substituted obligation. Representation, therefore, is of great importance in the law of obligation. It creates a subsidiary range of obligations differing from the main range only in the fact that the one obliged acts mediately through a representative, instead of immediately in person.

The problem reduced to its simplest terms is to discover when and under what circumstances a man is obligated by the act of his representative, either (1) in creating or attempting to create voluntary primary obligations, or (2) in committing a breach of primary antecedent obligations and thus giving rise to secondary substituted obligations. It is obvious that a representative might naturally be authorized to create primary obligations, but would not ordinarily be authorized to commit breaches of them. Agencies would therefore be expected to be created for the first purpose, but not for the second. But even if an agency be created for the first purpose, the agent may go beyond his actual authority and make

[1] Deceit and like wrongs are anomalous. The obligor imposes upon himself the obligation by his own representation, acted upon by the other party, and commits a breach of it at once in consequence of its falsity. This results in the secondary obligation to pay damages, or to make restitution, or it works an estoppel, according to circumstances. Owing to some peculiarities of classification and procedure, deceit has come to be regarded as a pure tort, but in several essential particulars it is more nearly allied to contract. See *post*, p. 12.

promises or representations not authorized. Is his principal bound thereby? So also a servant appointed for a purpose entirely foreign to the creation of obligations, may commit a breach of one while about his master's business. Is the master bound? These and similar problems are those that are treated under the title of agency.

§ 2. Meaning and scope of agency.

Agency is a term signifying the legal relations established when one man is authorized to represent and act for another and does so represent and act for another. The one represented may be comprehensively termed the constituent, and the one representing him may be termed the representative. More specifically the constituent is called either a principal or a master, while the representative is called either an agent or a servant. Agency therefore divides itself into two main heads, — the law of principal and agent, and the law of master and servant.

The authority is usually conferred upon the representative by the will of the constituent, but in a few instances it is conferred by the law in consequence of an existing relation or status of the two. Historically, the relation probably originated in status, and may have rested upon a fiction of identity,[1] but with the growth of individualism and the progress from status to contract, the relation has come to be mainly a consensual one. Yet the agency of a wife in the purchase of necessaries is a distinct remnant of the older doctrine,[2] and there has been an anomalous revival of it in our day in the identification of a child with its parent or guardian in cases of contributory negligence.[3]

The act which the representative is authorized to do may be either, — (1) to represent the will of the constituent to third persons with a view to establishing new legal relations between such persons and the constituent by creating voluntary

[1] O. W. Holmes, Jr., 4 Harv. Law Rev. 345; 5 *Ibid.* 1. But see 2 Pollock and Maitland's Hist. of Eng. Law, 225–227, 530, and 7 Harv. Law Rev. 107.

[2] *Post*, § 55.

[3] Hartfield *v.* Roper, 21 Wend. (N. Y.) 614.

primary obligations with their correlative rights, or (2) to perform for the constituent operative or mechanical duties not intended to create any new legal relations between him and third persons. When the representative is employed for the first purpose, he is called an agent, and his constituent is called a principal. When he is employed for the second purpose, he is called a servant, and his constituent is called a master.

The legal consequences of creating an agency may be threefold: (1) to establish new legal relations between the constituent and representative; (2) to establish new legal relations between the constituent (principal) and third persons, that is, to impose voluntary primary obligations upon the principal in favor of third persons, or give him correlative right against third persons, or to disturb existing legal relations between the constituent (master) and third persons, that is, to cause a breach of existing primary obligations; (3) to create new legal relations between the representative (agent) and third persons, or to disturb existing legal relations between the representative (servant) and third persons.

Agency, then, is the title under which we treat of the doctrines of representation in the law of obligation. Under the head of principal and agent, we treat of the creation of voluntary primary obligations and their correlative rights. Under the head of master and servant, we treat of the breach of such obligations and the substitution of secondary obligations and their correlative rights and remedies. Under both heads, we seek to discover the source and extent of the representative's authority, the rights and obligations of the constituent and representative, of the constituent and third persons, and of the representative and third persons.

§ 3. Distinction between agency and other legal relations.

Before proceeding to a discussion of the essential problems of agency, it is necessary to distinguish this legal concept from other concepts more or less nearly related to it. One person may act in the interest of another without being technically his agent or servant. In order, therefore, to delimit our subject,

we must first set aside and distinguish these analogous legal relations.

(1) *Agency or Trust.* "The germ of agency is hardly to be distinguished from the germ of another institution which in our English law has an eventful future before it, the 'use, trust, or confidence.'" [1] The two are now, of course, quite distinct, and the distinction is found fundamentally in this, that in agency the legal title and use of the property concerned are in the principal and not the agent, while in trusts the legal title is in the trustee and the use in the *cestui*. Accordingly, agency is a topic of the common law, and trusts a topic of equity jurisdiction. Yet for some purposes an agent is spoken of as a *quasi* trustee, and is required to account in equity.[2]

(2) *Agency or Partnership.* It is sometimes difficult to determine whether a contract creates the ordinary relation of principal and agent or the special relation of partnership. Even where parties unite in a joint enterprise and agree to share the profits, a partnership does not necessarily result; the participation in profits is an element in the problem, but is not decisive. It is a question of construction upon the whole agreement, the intention of the parties being the controlling consideration.[3] A partner is also an agent, but his agency is of a special and peculiar character.[4]

(3) *Agency or Sale.* Whether the relation between the parties is that of principal and agent, or vendor and vendee, must depend upon the construction of the contract. A. agrees to dispose of goods placed in his hands by B., and at periodical intervals return an account to B. of the sales made, and turn over to B. the value of the goods sold, at a fixed price, keeping himself the difference between this price and the price at which he has sold them. This might be a *del credere* agency,[5] or a sale as between A. and B. The construction to be placed on

[1] 2 Pollock and Maitland, Hist. of Eng. Law before Edw. I., p. 226.

[2] Marvin *v.* Brooks, 94 N. Y. 71; Warren *v.* Holbrook, 95 Mich. 185; *cf.* Uhlman *v.* N. Y. Life Ins. Co., 109 N. Y. 421.

[3] Grinton *v.* Strong, 148 Ill. 587; Wright *v.* Davidson, 13 Minn. 449.

[4] Burdick on Partnership, p. 159, 195.

[5] *Post*, § 96.

the contract will vary in accordance with the terms and the evident intention of the parties.[1] The refinements are too nice to be discussed here, but will be disclosed by an examination of the cases.

(4) *Agency or Bailment.* P. may deliver his property to A. for either of two purposes, namely, to sell for P. or to keep for P. In the first case A. is an agent; in the second a bailee. The nature of the understanding between P. and A. must determine whether the transaction results in the creation of an agency or a bailment. Thus in *Biggs* v. *Evans*,[2] an opal table was entrusted to a dealer on condition that it was not to be sold without first securing the authorization of the owner. The dealer sold it without such authorization, and it was held that the table was never entrusted to the dealer to sell, but only to keep, and that the purchaser acquired no title. Such a case may involve a question of ostensible agency or a question of ostensible ownership. Thus if an owner invests a bailee with the indicia of ownership, a purchaser from the bailee may acquire a good title as against the owner, not because the owner is estopped to deny the agency (for there is no holding out as agent), but because he is estopped to deny the bailee's ownership.[3] It may well be questioned whether *Biggs* v. *Evans* ought not to have been decided in favor of the purchaser, on the ground that one who permits his goods to be exposed by a dealer in such goods is estopped to deny the dealer's ownership. The doctrine of ostensible ownership is especially applicable to cases where the true owner invests another with documents of title.[4] It is to extend this doctrine of ostensible ownership that the "Factors Acts" have been passed.[5]

(5) *Agency or Lease.* In like manner it becomes a matter

[1] *Ex parte* White, L. R. 6 Ch. App. 397; *Ex parte* Bright, L. R. 10 Ch. D. 566; National Cordage Co. *v.* Sims, 44 Neb. 148; Willcox, &c. Co. *v.* Ewing, 141 U. S. 627; Chezum *v.* Kreighbaum, 4 Wash. 680; Singer Mfg. Co. *v.* Rahn, 132 U. S. 518.

[2] 1894, 1 Q. B. 88.

[3] McCauley *v.* Brown, 2 Daly (N. Y. C. P.), 426.

[4] Lickbarrow *v.* Mason, 2 T. R. 63; Pickering *v.* Busk, 15 East, 38; *post*, § 170.

[5] *Post*, § 171.

of construction whether a party to a contract is an agent or a lessee. Although the party may be acting under a formal power of attorney authorizing him to represent the other party in the management of certain property, yet this, taken in connection with the intent and conduct of the parties, may be construed as a lease of the property so as to make the lessee liable for rent as the assignee of the term.[1] If the construction of the relation is that of lessor and lessee, and not that of principal and agent, the lessor is not liable for the wilful or negligent acts of the lessee in the conduct of the property.[2] Thus if one lets his farm and stock on shares, he is not liable for the negligence of the lessee in keeping a vicious animal.[3]

(6) *Servant or Independent Contractor.* A person may be engaged to perform an operative act for another without becoming a servant. The test usually applied is whether the employer retains any control, or right of control, over the means or methods by which the work is to be accomplished. If he does, the employee is a servant;[4] if he does not, the other party to the contract is not strictly an employee at all, and is in no sense a servant, but is an independent contractor, responsible to his contractee for results only.[5] This is more fully considered hereafter.[6] The question whether one is liable for the unsafe condition of his premises, or of a public street over which he has been given control, involves other considerations having to do with the high degree of responsibility placed upon occupiers of premises.[7]

[1] Ragsdale *v.* Land Co., 71 Miss. 284, 303–307.

[2] Miller *v.* New York, &c. R., 125 N. Y. 118.

[3] Marsh *v.* Hand, 120 N. Y. 315.

[4] Linnehan *v.* Rollins, 137 Mass. 123; Lawrence *v.* Shipman, 39 Conn. 586. The owner may approve or disapprove the results of the work daily without retaining control over methods. Casement *v.* Brown, 148 U. S. 615.

[5] Bailey *v.* Troy, &c. Co., 57 Vt. 252; Harrison *v.* Collins, 86 Pa. St. 153; King *v.* New York Central, &c. R., 66 N. Y. 181; Morgan *v.* Smith, 159 Mass. 570; 35 N. E. 101.

[6] *Post*, § 218.

[7] Gorham *v.* Gross, 125 Mass. 232; Woodman *v.* Met. R. Co., 149 Mass. 335.

(7) *Transfer of Service.* A master may transfer temporarily the service of his servant to another, so as to make the servant the representative of the transferee. Thus A. rents a machine to B. with a man to operate it. If, in the operation of the machine, the man is under the control of B., he becomes B.'s servant as to the operation, though not perhaps as to the inspection and repair, of the machine.[1] But otherwise, if the man remains under the control of A., who stands somewhat in the relation of an independent contractor.[2] The master cannot transfer the control over a servant without the latter's consent.[3] Transfer of service is more fully considered hereafter.[4]

§ 4. Distinction between the law of principal and agent, and the law of master and servant.

Agency[5] divides itself into two main heads, — the law of principal and agent,[5] and the law of master and servant. The fundamental distinctions between the two are to be sought, — (1) in the nature of the act authorized, and (2) in the nature of the obligation resulting from the performance of the act, and (3) in the nature of the legal test fixing the constituent's liability for an act in excess of authority.

(1) The primary distinction between representation through an agent, and representation through a servant, lies in the nature of the act which the representative is authorized to perform. An agent represents his principal in an act intended,

[1] Donovan *v.* Laing, (1893) 1 Q. B. 629.

[2] Quinn *v.* Complete Electric Const. Co., 46 Fed. Rep. 506; Huff *v.* Ford, 126 Mass. 24.

[3] *Post*, § 86.

[4] *Post*, § 228.

[5] It is to be regretted that the word "agency" should be used to cover the whole field of representation, and that the word "agent" should at the same time be used as the name of the representative in one branch of it. If there were another word for agency (*e. g.* representation), or another word for agent (*e. g.* deputy), many tedious circumlocutions might be avoided. It might be better still if the whole field were called the "Law of Representation," while the branch known as the "Law of Principal and Agent" were called the "Law of Agency," and that known as the "Law of Master and Servant," were called the "Law of Service."

or calculated, to result in the creation of a voluntary primary obligation or undertaking. A servant represents his master in the performance of an operative or mechanical act of service not resulting in the creation of a voluntary primary obligation, but which may result, intentionally or inadvertently, in the breach of an existing one. An agent makes offers, representations, or promises for his principal, addressed to third persons, upon the strength of which such third persons change their legal relation or position. A servant performs operative acts not intended to induce third persons to change their legal relations. An agent has to take account of the mind and will of two persons, namely, of his principal whose mind he represents, and of the third person whose mind he seeks to influence. A servant has to take account of the mind and will of one person, namely, of his master whose existing obligations and duties he is to perform. An agent may cause damage by inducing a third person to act. A servant may cause damage by acting upon a third person or his property or rights. In representation through an agent there are always three persons involved, the principal, the agent, and the third person. In representation through a servant, there are only two persons primarily involved, the master and the servant, and the third person is introduced only when the servant commits, in the course of his master's business, a breach of the obligations owing by the master to a third person. In the first case, there are three persons and the third is induced to act. In the second case, there are three persons and the third is acted upon.

(2) The secondary distinction between representation through an agent, and representation through a servant, hangs in sequence upon the primary one. The agent, by influencing the will of the third person, induces him to enter into new legal relations with the principal. The servant, by acting upon the already existing legal relations of the principal and the third person, may commit a breach of his principal's obligations. The agent lays upon his principal a primary obligation to make good a promise or a representation. A servant may lay upon his master a secondary obligation to repair the breach of an antecedent or primary one. The law governing

principal and agent has therefore to do with the creation of new obligations. The law governing master and servant has to do with the breach of existing obligations. The main, but not the exclusive, subject-matter of the first is contract. The main, but not the exclusive, subject-matter of the second is tort. The first includes, besides contract, such gratuitous undertakings as may be enforceable, such estoppel obligations as may be enforceable, and such tort obligations as result from a false representation acted upon by the one to whom it is made, namely, deceit and torts analogous to deceit. The second includes, besides torts, the breach of existing contract obligations or voluntary undertakings, though it will usually be found in such cases that the undertaking, while it may originate in contract, is really larger than contract, and that its breach is remediable in an action *ex delicto*.[1]

An agent therefore is a representative who creates bifactoral obligations to which his principal is a party. These are usually contracts; but other concepts of the law fall within the classification, namely, gratuitous undertakings, estoppel, and deceit. In a gratuitous undertaking the obligation is voluntary, and it is fixed by the act of the one who suffers a detriment relying upon it. In estoppel the obligation is voluntarily undertaken by making a representation and is fixed by the act of the one who suffers a detriment relying upon it; thereafter the maker of the representation is estopped to deny its truth. In deceit, the matter is not so clear because of the habit of regarding deceit as strictly a tort arising from the breach of an absolute involuntary obligation. But deceit differs from all other torts in this, that it consists in influencing the conduct of another person to his damage. Its first appearance seems to have been in an action for a false warranty, and it was not until 1778 that an action in assumpsit on a warranty first appears in the reported cases.[2]

[1] For example, where a carrier undertakes by contract to transport a passenger, and his servant entrusted with the performance of the duty is negligent, the passenger has an action either for breach of contract, or in tort for negligence. Bigelow on Torts, 7th ed., §§ 54–56.

[2] Ames, Hist. of Assumpsit, 2 Harv. Law Rev. 8.

Moreover the first actions for breach of parol promises were actions on the case for deceit,[1] and assumpsit to-day retains in the doctrine of consideration the earmarks of its origin, "because only he who had incurred detriment upon the faith of the defendant's promise, could maintain the action on the case for deceit in the time of Henry VII."[2] Deceit, therefore, while sounding in tort, resembles contract and estoppel in this, that it arises from a voluntary representation by one party acted upon by another to his detriment. Strictly speaking, the obligation is created voluntarily by the one making the representation, but its extent is determined by the detriment suffered by the one acting upon it. It is therefore proper, or at least it serves a useful purpose, to include deceit among the voluntary bifactoral obligations.

(4) The third distinction between representation through an agent, and representation through a servant, lies in the nature of the test fixing the constituent's liability for acts of his representative in excess of the actual authority. In the case of the principal, this test is to be sought in the doctrine of estoppel. In the case of the master, this test is to be sought in the doctrine that one who employs an instrumentality for an operative act must remain liable, within reasonable limits, for its defects. The nature of these tests will be explained more fully in the succeeding section. What it is important to note here is the fact that the distinction between the two branches of agency involves more than a mere matter of classification, and goes direct to the central problem of agency, namely, when and upon what doctrine is a constituent liable for the acts of his representative in excess of the authority conferred.

§ 5. Basis of the constituent's liability for the acts of his representative.

The main problem of agency is to discover when, and under what circumstances, a man is liable for the acts of his representative. This problem would be a comparatively easy one

[1] Ames, Hist. of Assumpsit, 2 Harv. Law Rev. 15.
[2] *Ibid.* p. 16.

were it true that a man is obligated by the act of his representative only when he has in fact authorized the representative to do or not to do that which results in obligation, or when he has ratified as his own an act of his representative not originally authorized. Agency is a compendious term signifying the instrumentality through which a result is accomplished; in its normal sense it means the instrumentality through which the will of an individual is accomplished. If therefore a man chooses to employ a particular agency to carry out his pre-determined purpose, he is of course responsible for the result determined upon and reached, as fully as if he had acted immediately instead of mediately. In such a case, we should be concerned only with the result, and not with the means through which it was accomplished. But the doctrine is much more sweeping in its application. In the employment of a human agency, the constituent must take account, not only of his own will, but also of the will of the representative. This second will may prove either incompetent, or careless, or perverse, and from this incompetence, carelessness, or perversity may flow consequences never intended by the constituent, but for which the law holds him accountable. Thus it follows that a man may be obligated by the act of a representative which he has not only not authorized, but which he has in terms forbidden. The problem therefore resolves itself into this, when and why is a man held liable for acts of his representative, neither commanded nor ratified, acts in excess of any actual authority conferred?

It has been contended that we must seek the basis of liability in such cases in the fiction of identity.[1] It has, on the other hand, been contended that this fiction plays a small part historically in the development of the law of representative liability, and that the basis of the liability is the voluntary act of the employer in setting the representative in motion, or that one must answer, within reasonable limits, for an instrumentality operating for his benefit.[2] Still others would contend that the whole matter is determined mainly by the

[1] O. W. Holmes, Jr., 4 Harv. Law Rev. 345, and 5 *Ibid.* 1.
[2] J. H. Wigmore, 7 Harv. Law Rev. 383.

practical consideration that the employer is usually better able to pay than the representative.[1]

Much confusion has been occasioned by the failure to distinguish between liability for acts creating primary obligations and giving rise to primary rights, and liability for acts violating primary obligations and giving rise to secondary obligations and secondary or remedial rights. In the first case the employer has authorized a representative to make promises or representations and to induce third parties to act upon them. The sole legal question then is, had the third person, in acting upon the representative's statements, reasonable grounds for believing that the representative was authorized to make them? In other words, had the agent *apparent* authority to do what he did do? If so, then the employer is estopped to deny that that which he made to appear to be true is not true, since a third person has acted upon the representation of the principal as to the agent's authority.[2] This is a solid ground of liability which dispenses with all fictions and all slippery considerations of the limits within which one man ought to be held liable for the perversity of his instrumentalities. The earliest authorities which suggest this ground of liability are in cases of deceit where, as in contract, the essence of the employer's liability consists in the fact that he has held out his agent as having authority to make representations, and the third party has, relying on this apparent authority and the agent's representations, changed his legal position.[3] And in contract cases this ground is distinctly taken.[4]

[1] 2 Pollock and Maitland, Hist. of Eng. Law, 530–532. See also 7 Harv. Law Rev. 107.

[2] *Post*, §§ 51, 52, 102, 103.

[3] Southerne *v.* Howe, 2 Rolle's Rep. 5, 26 (1618), in the argument of counsel; Hern *v.* Nichols, 1 Salk. 289 (1708).

[4] Hazard *v.* Treadwell, 1 Stra. 506 (1768); Pickering *v.* Busk, 15 East, 38 (1812); Whitehead *v.* Tuckett, 15 East, 400 (1812). In Pickering *v.* Busk, it is said, "This case . . . proceeds on the principle, that the plaintiff having given Swallow an [implied] authority to sell, he is not at liberty afterwards, when there has been a sale, to deny the authority." The

But in the second class, where the act of the representative consists in the breach of his employer's antecedent obligations and an infringement of the third party's antecedent rights, the basis of liability is by no means so clear. Here the third party is not misled by any representations of the employer as to the employee's authority. Here the consideration that where one employs an instrumentality for a merely operative purpose he ought to be liable, within reasonable limits, for its defects, must be invoked.[1] But what are the limits? (1) A negligent performance of the operative act while the servant is within the course of the employment, is an incident which ought fairly to attach to the operation as a whole, and render the master liable. Upon this modern cases express no doubt. (2) A wilful damage inflicted upon a third party by the servant in the performance of the operative act (as an intentional assault or trespass) has given more trouble.[2] But the modern form which the test of liability has taken is that if the wilful act was done by the servant in furtherance of, and within the course of the employment or business entrusted to him, the master is liable.[3] It will be noted that there are two tests here (*a*) "in the course of the employment" and (*b*) "in the furtherance of the employment," or, as it is sometimes stated, "for the master's benefit." While both of these tests are usually applied, there are some cases which escape the second, and the master is held liable where the act was not "in the furtherance of the employment."[4]

The basis of liability for a representative's acts may therefore be said to be:

principle is clearly put by Lord Cranworth in Pole *v.* Leask, 33 L. J. Ch. 155 (1863).

[1] Undoubtedly the earliest cases proceeded on the ground of an express command (save where as in cases of fire there is a duty to insure safety), but the law speedily escapes this narrow doctrine, and gradually moulds itself into the modern doctrine through the intermediate fiction of an "implied command." See Wigmore, 7 Harv. Law Rev. 383.

[2] McManus *v.* Crickett, 1 East, 107 (1800); Wright *v.* Wilcox, 19 Wend. 343 (1838).

[3] *Post*, § 252.

[4] *Post*, § 254.

(1) Command or ratification where the act is within the actual authority;[1]

(2) Estoppel to deny authority, where the act is in excess of actual authority, and consists in the making of a promise or representation upon which a third party acts;[2]

(3) The course of the employment, where the act is in excess of authority and consists in negligent harm to a third person in the performance of an operative act;[3]

(4) The course of the employment and the furtherance of the employment or business, where the act is in excess of actual authority, and consists in a wilful harm to a third person.[3]

§ 6. **Definition of agent and servant.**

An agent is a representative vested with authority, real or ostensible, to create voluntary primary obligations for his principal, by making contracts with third persons, or by making promises or representations to third persons calculated to induce them to change their legal relations.

"Vested with authority" includes authority acquired through the will of the principal or by operation of law, and authority acquired either prior to or subsequent to the performance of the representative act.

A servant is a representative vested with authority to perform operative acts for his master not creating new primary obligations, or bringing third persons into contractual relations with the master, or otherwise causing them to change their legal position. A master comes under obligations to third persons by the act of his servant only when the servant commits a breach of the master's primary obligations and thus creates secondary substituted obligations.

"Vested with authority" means here the same as in the preceding definition. But the authority in such case must be real, not ostensible merely, since no doctrine of estoppel

[1] Applicable to the law of principal and agent, and the law of master and servant.

[2] Applicable only to the law of principal and agent.

[3] Applicable only to the law of master and servant.

is applicable except where a third person is induced to change his position. If he is induced to change it in consequence of the ostensible authority, then the representative is an agent.

To put the whole matter shortly, an agent is one really or ostensibly authorized to create voluntary antecedent or primary obligations for his principal in favor of third persons, or to acquire such obligations for his principal as against third persons; while a servant is one authorized to perform operative acts not creating primary obligations, but which may result in the breach of antecedent primary obligations, voluntary or involuntary.

Since it is the nature of the act to be performed that constitutes the essential difference between the two classes of representatives, it follows that the same representative may be both an agent and a servant, and herein lies the source of much of the confusion that prevails in the discussion of the law of representation. It is often said that the distinction lies in the fact that an agent is vested with discretion, while a servant is not.[1] But this is obviously incorrect. A railway conductor is not an agent merely because he is vested with a wide discretion as to the management of his train; he may or may not be a vice-master, but he is a servant so long as his authority is to do an act not resulting in contractual obligation; if vested with authority to engage employees or make contracts of carriage then for that purpose he is an agent and not a servant, since his act results in the creation of a contractual obligation. So a representative authorized to sell a horse to a specified person at a specified price for cash is not a servant merely because he has no discretion as to the terms of the sale; his act results in a contractual obligation, and he is therefore an agent; if, however, he is vested with authority to drive the horse to a designated place, he is a servant in the performance of that duty, and if he drive the horse negligently to the injury of A., the master becomes liable in tort for the damage.[2]

[1] 28 Am. L. Rev. 9, 22, *citing* Chicago, &c. R. Co. *v.* Ross, 112 U. S. 377, 390.

[2] "The great and fundamental distinction between a servant and an

§ 7. Classification of agents and servants.

Agents are often classified as universal agents, general agents, and special agents.

A universal agent is said to be one authorized to transact for his principal any and all business which can be done through a representative. Such agencies are rather theoretical than practical, and a universal agent is, at most, a "general agent" in the superlative degree. We may, therefore, disregard this class of agents.

A general agent is said to be (*a*) one authorized to act for his principal in all matters (universal agent), or in all matters connected with a particular trade or business, or in all matters of a particular nature, or (*b*) one whose business or profession it is to transact for any or all persons a particular kind of business, as a factor, broker, auctioneer, lawyer, etc.[1]

A special agent is said to be one authorized to act for his principal in only a single, specific transaction, such act or transaction not being in the ordinary course of a trade or profession which he is following.[2]

Many refinements as to the liability of a principal have been built upon the distinction between general agents and special agents. The distinction, however, is a vague one and often leads to more confusion than it cures. To begin with, writers do not agree as to the distinction itself, much less as to its legal effects. One writer makes the distinction to consist in the extent of the representation; that is, if the agent represents the principal in a single transaction, he is a special

agent is, that the former is principally employed to do an act for the employer, not resulting in a contract between the master and a third person, while the main office of an agent is to make such contract. Servants may make contracts incidentally, while agents may in the same way render acts of service. The principal distinction between them, however, is as above stated." — Dwight, Persons and Pers. Prop. p. 323. See Singer Mfg. Co. *v.* Rahn, 132 U. S. 518; Hand *v.* Cole, 88 Tenn. 400; Jones *v.* Avery, 50 Mich. 326.

[1] Sometimes (*a*) is given as the correct definition, sometimes (*b*), and sometimes both (*a*) and (*b*).

[2] Sometimes the definition is given with, and sometimes without, the last qualifying phrase.

agent, while if he represents him in all business dealings of a particular kind, he is a general agent.[1] Another writer finds the distinction in the source of the discretionary power. If the agent's powers are fixed by the terms of his appointment, he is a special agent, while if his powers are fixed by custom and usage, he is a general agent.[2] Clearly it would be of the first importance to know which of these views is correct if anything depended upon the distinction, for they are irreconcilable. If a principal entrusted a cargo of wheat to a factor to sell, the agent would be a special agent under the first view, but a general agent under the second. If a principal's liability depends upon the solution of the question whether the agent is special or general, the conclusions reached would be exactly opposed to each other. As we shall see later, the question of the principal's liability can be determined without involving it in the solution of this preliminary question.[3] The terms special agent and general agent may therefore be disregarded except as terms of convenience to indicate broadly the scope of the agency. The liability of a principal for the acts of his agent depends upon the ostensible authority which he has conferred: in determining this it is often necessary to inquire whether the agent has really or apparently been entrusted with the conduct of a business generally, whether he is an agent whose powers are fixed by the customs of a trade or profession, or whether, not following a customary trade or profession, he has been engaged to carry out a single or particular transaction.[4] As a convenient method of indicating briefly the distinction between agents transacting a general business for the principal, or following a customary trade or profession, and agents transacting a particular item of business for the principal, and not following a customary trade or profession, the terms general agent and special agent may, perhaps, serve some useful purpose; but this can only be if all who use the terms affix to them the same significance.

[1] Mechem on Agency, § 6; Story on Agency, § 17; Butler *v.* Maples, 9 Wall. (U. S.) 766.

[2] Holland, Jurisp. (9th ed.) p. 260; Dwight, 1 Col. Law T. 81.

[3] *Post*, § 104.

[4] *Post*, § 106.

Agents are also divided into *del credere* agents, or those who guarantee their principals against the default of those with whom contracts are made, and agents not *del credere*, or those who do not guarantee credits.[1]

Special names are also applied to certain classes of agents, as, attorneys-at-law, auctioneers, brokers, factors or commission merchants, shipmasters, cashiers, etc.[2]

Servants are also divided into various classes, as, general managers, superior officers, vice-principals, fellow-servants, etc.[3]

§ 8. Division of the subject of agency.

The law of agency is divided into the law of principal and agent and the law of master and servant, as already explained.

Under each of these two heads agency may be treated from three quite distinct points of view. First, it may be treated as a contract between principal and agent or master and servant, and inquiry may be directed to the ascertainment of the terms and legal effects of this contract. Second, it may be treated as a means to the formation of new relations between the principal and third parties, or as a means for the carrying out of operative acts for the master that may result in harm to third parties, and inquiry may be directed to the legal effects of the employment of such instrumentalities. Third, it may be treated as a means of bringing the agent or servant into contact with third parties, and inquiry may be directed to relations which the agent may personally establish in acting for the principal, or in excess of authority, and harm which the servant may occasion or suffer in acting for the master or in excess of authority.

The first view of the subject presents no special difficulties, since the contract obligations are created by two parties in person, and the usual doctrines of contracts for personal service are applicable. This part deals, therefore, with the formation, termination, and legal effects of contracts of agency or service.

The second view is the one which makes necessary a special

[1] *Post*, § 96. [2] *Post*, § 110 *et seq.* [3] *Post*, § 270.

treatment of the law of agency, — first, because an agency may be created otherwise than by contract between the constituent and the representative, and second, because a constituent, whose will is thus represented, may be made liable to third persons in cases where the representative proves careless, incompetent, or perverse, and even where he acts in direct opposition to the express commands of the constituent.

The third view is, in a sense, subordinate to the second, for in cases where the representative acts as for himself and not for his constituent, or where he acts in excess of authority, or wrongfully, he may incur legal obligations to third persons as well as to his constituent, and may, in some cases, acquire legal rights against third persons. The subject of agency is therefore divided, logically, into two great parts:

(I.) The law of principal and agent;

(II.) The law of master and servant.

Each of these parts is divided into four parts:

(1) The formation of the relation, either as regards obligations subsisting between constituent and representative, or as regards the authority of the representative to act for the constituent. Incidental to this is the subject of the termination of the relation.

(2) The mutual rights and obligations of the constituent and representative as to each other.

(3) The mutual rights and obligations of the constituent and third persons growing out of the exercise of authority by the representative.

(4) The mutual rights and obligations of the representative and third persons arising from the acts of the representative.

PART I.

FORMATION AND TERMINATION OF THE RELATION OF PRINCIPAL AND AGENT.

§ 9. Introductory.

The inquiry whether the relation of principal and agent has been formed or exists may arise either in a controversy between the principal and agent, or between the principal and some third person with whom the agent has dealt, or between the agent and such third person. To avoid useless repetition, this part of the work will therefore discuss the formation of the relation as concerns any one or all of these possible cases. For the one or the other of these purposes the relation may be formed in any one of four ways: (1) by agreement; (2) by ratification; (3) by estoppel; (4) by necessity. In addition to a consideration of the methods of forming the relation, this part will also discuss the methods by which the relation may be terminated.

The problem of whether the relation has been established as between the principal and third persons involves the doctrines of ostensible, as distinguished from actual, agency, doctrines more fully treated under the head of estoppel.

It should also be noted that much, but not all, of what follows is applicable to the formation of the relation of master and servant. Accordingly some cases cited have to do with master and servant so far as concerns the formation of the relation of employer and employee.

CHAPTER II.

FORMATION OF THE RELATION BY AGREEMENT.

§ 10. Elements of agreement.

Agreement is a broader term than contract. It implies, however, an offer and acceptance, or a meeting of the minds, or manifestation of the meeting of the minds, of the parties.[1] Accordingly an agency by agreement is one where the principal and agent mutually consent to the formation of the relation. Such an agreement may amount to a contract, or it may fall short of contract. If it amount to a contract, it is binding as between principal and agent, and when acted upon may bind the principal to third persons or third persons to the principal. If it falls short of contract, it will not bind the principal and agent as a contractual obligation, but is good as an appointment of an agent, and if acted upon by the agent under such appointment may bind the principal to third persons or third persons to the principal, and may render the agent liable to the principal for misfeasance.

The assent of the principal may be express or implied, and, as to third persons, it may rest upon a holding out giving rise to an estoppel to deny the assent.[2] It may be subsequent to the act of the agent and amount to ratification.[3]

The assent of the agent may be express or implied. It is implied whenever he undertakes to act for another; and his conduct, in so acting for or on behalf of another, may give rise to an estoppel to deny the agency.[4]

Under the head of agency by agreement, we have then to consider, (1) agency by contract, and (2) agency by agreement falling short of contract.

[1] Huffcut's Anson on Cont. p. 2.
[2] *Post*, §§ 52, 103.
[3] *Post*, § 30 *et seq.*
[4] Roberts *v.* Ogilby, 9 Price, 269.

1. *Agency by Contract.*

§ 11. Elements of contract.

A contract of agency (that is, a contract binding as between the principal and agent) must possess all the essential elements of any enforceable contract, namely, true agreement, consideration, competent parties, legality of object, and in some cases a particular form.[1] Most of these elements call for no special discussion, as they differ in the contract of agency in no essential particular from the like elements in any contract known to the law. Some special points of difficulty may be briefly noted.

§ 12. Agreement, forms of.

The agreement between the principal and agent may take any one of three forms: the offer of a promise for an act; the offer of an act for a promise; the offer of a promise for a promise.[2]

The first case is where the principal promises remuneration if the agent will render a service. The promise may be express, or it may be an implied promise to pay what the services are reasonably worth. An express agreement controls;[3] in its absence an implied agreement may be inferred. Strictly the promise would be offered for the act only when there was a request that the act be done.[4] And even in such a case the circumstances may negative any implication that the services were to be paid for.[5] Such is the result where the services are rendered by one member of a family at the request of another.[6]

The second case is where the agent offers a service which the principal accepts. The acceptance may be by express words, stating the terms, in which case the express promise would control; or it may be by conduct, in which case there is an implied promise to pay what the services are reasonably

[1] Huffcut's Anson on Cont. p. 12 *et seq.*
[2] Huffcut's Anson on Cont. pp. 402–403.
[3] Wallace *v.* Floyd, 29 Pa. St. 184.
[4] Van Arman *v.* Byington, 38 Ill. 443.
[5] Scott *v.* Maier, 56 Mich. 554.
[6] Hall *v.* Finch, 29 Wis. 278.

worth.[1] The test is as to whether a reasonable man would understand that the agent expected to be paid for his services. It is because reasonable men understand that services rendered by one member of a family for another are generally gratuitous that an offer of an act by the one, accepted by the other, raises no promise to pay.[2] Of course if the offer of the act is not communicated to the principal until after it is performed, and he has therefore had no opportunity either to accept or reject it, he would not be bound without a ratification.[3]

The third case is that of a promise for a promise, namely, an express contract by which the agent promises to perform the service, and the principal to pay for it. In this, and the other cases, it is necessary as between employer and employee that the agreement be real, that is, free from mistake, misrepresentation, fraud, or duress. As between the employer and third person, the authority, if exercised, binds the employer.

§ 13. Consideration.

Consideration consists in a benefit to the promisor or a detriment to the promisee. It is as necessary to the contract of agency as to contracts generally. The only case calling for special mention is where the services have been rendered gratuitously, and there is a subsequent promise to pay for them. Generally speaking there would be no consideration for the subsequent promise, since, there being no prior legal obligation, the case would be one of past consideration, which will not support a promise.[4] Cases which seem to hold to the contrary are those in which there was either a previous request, express or implied, or where the services were rendered under such circumstances as not to be deemed gratuitous, and the subsequent promise merely fixes expressly the value of the services.[5]

[1] Muscott *v.* Stubbs, 24 Kans. 520; McCrary *v.* Ruddick, 33 Iowa, 521.

[2] Hertzog *v.* Hertzog, 29 Pa. St. 465; Hall *v.* Finch, 29 Wis. 278.

[3] Bartholemew *v.* Jackson, 20 Johns. (N. Y.) 28; James *v.* O'Driscoll, 2 Bay (S. C.), 101.

[4] Allen *v.* Bryson, 67 Iowa, 591.

[5] Dearborn *v.* Bowman, 3 Metc. (Mass.) 155; Hicks *v.* Burhans, 10 Johns. (N. Y.) 243; Wilson *v.* Edmonds, 24 N. H. 517.

But while gratuitous services may raise no promise to compensate, a promise to perform a gratuitous service, followed by an actual performance, in whole or in part, may be enforceable to the extent of rendering the agent liable for negligence. But whether this is on the ground of contract or tort, is not clear.[1] Moreover, as to third persons, the question whether there is any consideration as between employer and employee is immaterial.

§ 14. Parties, — competency of, generally.

Generally speaking, parties competent to make any contract are competent to make a contract of agency.[2] As between the principal and agent this rule is well enough, but as between the principal and third persons it calls for further examination and modification. On the one hand, we have to inquire whether an incompetent person, as a lunatic or an infant, can make a contract through a competent agent; on the other, whether a competent person can make a contract through an incompetent agent. This discussion is applicable to cases of gratuitous agency and of ratification, as well as to cases of agency by contract.

§ 15. Parties. — Infant principals.

It is sometimes said that all contracts of an infant are voidable except two, — the contract for necessaries, which is binding, and the contract for the appointment of an agent, which is void.[3] It is the last proposition which calls for special notice.

If an infant, by contract or otherwise, appoints an agent, and this agent makes a contract with X. in behalf of the infant principal, is the contract so made void or voidable? If the appointment of the agent is a void act, then obviously no legal results can flow from it, and the contract with X. must likewise be void. If void, it could not be ratified by any subsequent act of the principal.[4] There are many cases

[1] Thorne *v.* Deas, 4 Johns. (N. Y.) 84. *See post*, § 29.

[2] See generally Huffcut's Anson on Cont. Pt. II. Ch. iii.

[3] Fetrow *v.* Wiseman, 40 Ind. 148, 155.

[4] *Post*, § 41.

which make the sweeping statement of the law that the appointment of an agent by an infant is a void act, and that the acts done by the agent in behalf of the principal are likewise void.[1] But these authorities are in most cases based upon the appointment of an attorney by formal warrant of attorney, and the rule to be deduced from them is that the formal power or warrant of attorney by an infant, not conveying a present interest, is void.[2] The American cases show a decided tendency to confine the rule to this class of cases, and to hold that the appointment of agents by an infant generally, is a voidable and not a void act.[3] Yet there is authority for the broader rule that the appointment of any agent by an infant is void.[4] It is admitted that the exception, if it be one, is not founded on any intelligible principle, and the tendency to confine it within the narrow limits of formal powers of attorney is likely to prevail.[5] "The courts have, from time to time, made so many exceptions to the exception itself that there seems to be very little left of it, unless it be in cases of powers of attorney required to be under seal, and warrants of attorney to appear and confess judgment in court."[6]

§ 16. Parties. — Insane principals.

The generally accepted rule in England as to the effect of insanity upon contracts is that "a defendant who seeks to avoid a contract on the ground of his insanity, must plead and prove, not merely his incapacity, but also the plaintiff's knowledge of that fact, and unless he proves these two things

[1] Philpot *v.* Bingham, 55 Ala. 435; Knox *v.* Flack, 22 Pa. St. 337; Bennett *v.* Davis, 6 Cow. (N. Y.) 393.

[2] Lawrence *v.* McArter, 10 Ohio, 37; Waples *v.* Hastings, 3 Harr. (Del.) 403.

[3] Patterson *v.* Lippincott, 47 N. J. L. 457; Towle *v.* Dresser, 73 Me. 252; Hardy *v.* Waters, 38 Me. 450; Hastings *v.* Dollarhide, 24 Cal. 195; Whitney *v.* Dutch, 14 Mass. 457.

[4] Trueblood *v.* Trueblood, 8 Ind. 195; Armitage *v.* Widoe, 36 Mich. 124.

[5] Cases *supra;* Moley *v.* Brine, 120 Mass. 324; Fairbanks *v.* Snow, 145 Mass. 153.

[6] Mitchell, J., in Coursolle *v.* Weyerhauser, 69 Minn. 328, 333.

he cannot succeed."[1] In the United States the authorities are in confusion, but the following principles are supported by abundant and perhaps decisive authority: (1) Where the sane person does not know of the other party's insanity, and there has been no judicial determination of such insanity, and the contract is so far executed that the parties cannot be put *in statu quo*, the contract is binding on the lunatic.[2] (2) Conversely, the contract is voidable if the sane party knew of the other's insanity;[3] if the lunatic had in fact been adjudged insane, whether the sane party knew such fact or not;[4] if the contract is bilateral, or if the sane party can be put *in statu quo*.[5] (3) The contract is void if the statute provides that contracts by lunatics shall be void,[6] or if it provides that contracts by lunatics under guardianship shall be void;[7] and in some jurisdictions the doctrine of void contracts is pushed beyond statutory limits in case of deeds, and all deeds of insane persons under guardianship are held void;[8] there is also high authority to the effect that a power of attorney by a lunatic is absolutely void.[9]

The application of these principles to the contract of agency would support these propositions. As between the principal and agent the contract would be voidable if, when it was formed, the principal had been adjudged insane, or the agent

[1] Lopes, L. J., in Imperial Loan Co. *v.* Stone, 1892, 1 Q. B. 599; Drew *v.* Nunn, L. R. 4 Q. B. D. 661.

[2] Gribben *v.* Maxwell, 34 Kans. 8; Young *v.* Stevens, 48 N. H. 133; Mutual Life Ins. Co. *v.* Hunt, 79 N. Y. 541.

[3] Crawford *v.* Scovell, 94 Pa. St. 48.

[4] Inquisitions to ascertain facts of public interest are analogous to proceedings *in rem*, and so conclusive on all the world. Wadsworth *v.* Sharpsteen, 8 N. Y. 388, 392; Carter *v.* Beckwith, 128 N. Y. 312.

[5] Burnham *v.* Kidwell, 113 Ill. 425. See Wirebach *v.* First Nat. Bk., 97 Pa. St. 543.

[6] This is sometimes the case as to deeds. Ind. Rev. St. (1881) § 2917; Ga. Code, § 2735.

[7] Cal. Civ. Code, §§ 38–40; Dak. Civ. Code, §§ 2519–2521.

[8] Van Deusen *v.* Sweet, 51 N. Y. 378; Gibson *v.* Soper, 6 Gray (Mass.), 279; Rogers *v.* Blackwell, 49 Mich. 192; Hovey *v.* Hobson, 53 Me. 451.

[9] Dexter *v.* Hall, 15 Wall. (U. S.) 9.

knew he was in fact insane. It would be void if the statute declared contracts of insane persons void, and, it would seem, if it was created by power of attorney. It would be binding if the insane person had not been so adjudged and the agent made the contract in good faith, ignorant of the insanity; at least it would be binding so far as acted upon by the agent.

As between the principal and third parties the same result would follow. Knowledge of the insanity, or the absolute notice arising from its judicial determination, would make the contract voidable. But absence of both knowledge and notice would make it binding, at least in all cases where the contract has been acted upon. But what of the case where the agent knows his principal is insane? If the principal is sane when the agent is appointed, but subsequently becomes insane to the knowledge of the agent, but unknown to the third party, the contract is binding.[1] This is put on the ground that the principal when sane represents the agent as having authority, and third persons may act on the representation until they have notice of its withdrawal. It is a case where one of two innocent parties must suffer by the wrongful act of the agent, and the loss should fall on the one whose representation is the proximate cause of the injury.[2]

§ 17. Parties. — Married women as principals.

A married woman could make no binding contract at common law. All her contracts were absolutely void. Modern statutes, however, have gone far to remove her common law disabilities, and she may now contract in some jurisdictions as freely as an unmarried woman. To the extent that she may contract generally in her own person she may contract through an agent,[3] but, of course, to no greater extent.[4] If she may contract through an agent, she is liable on doctrines

[1] Drew *v.* Nunn, L. R. 4 Q. B. D. 661; Davis *v.* Lane, 10 N. H. 156; Matthiessen, &c. Co. *v.* McMahon's Adm'r, 38 N. J. L. 536.

[2] As to termination of agency by insanity, see *post*, § 71.

[3] Weisbrod *v* Chicago, &c. R., 18 Wis. 35.

[4] Kenton Ins. Co. *v.* McClellan, 43 Mich. 564; Nash *v.* Mitchell, 71 N. Y. 199.

of estoppel for ostensible authority, the same as any other person.[1] Some early statutes giving married women the power to convey their lands by deed, but not otherwise enlarging their contractual capacity, were strictly construed so as to require an execution of deeds in person and not through an attorney; under these statutes it was held that a married woman could not appoint an attorney to do what she might do in person.[2] In general a married woman may now appoint an agent and may appoint her husband as agent.[3] Even where she could not have an agent, it seems she could have a servant to care for her estate for whose operative acts she would be liable.[4]

§ 18. Parties. — Corporations as principals.

A corporation has the powers expressly conferred by its charter or impliedly necessary to carry into effect the provisions of that instrument. The corporate charter usually confers an express power to appoint agents, but even in the absence of such provisions the power is implied, both as to the official agents through whom a corporation must act, and also as to the inferior agents who may be employed at the discretion of the managers.[5] But the appointment of an agent in excess of these powers would be a void act, not binding on the corporation so far as the agent is concerned, though if the corporation had had the benefit of his services he might recover in *quantum meruit*.[6] Whether authority to affix the corporate seal must be under seal is discussed hereafter.[7]

[1] Bodine *v.* Killeen, 53 N. Y. 93.

[2] Sumner *v.* Conant, 10 Vt. 9; Earle *v.* Earle, 20 N. J. L. 347.

[3] Weisbrod *v.* Chicago, &c. R., 18 Wis. 35.

[4] Flesh *v.* Lindsay, 115 Mo. 1.

[5] Protection Life Ins. Co. *v.* Foote, 79 Ill. 361; Hurlbut *v.* Marshall, 62 Wis. 590; Washburn *v.* Nashville, &c. R. R. Co., 3 Head (Tenn.), 638; St. Andrew's Bay Land Co. *v.* Mitchell, 4 Fla. 192.

[6] Slater Woollen Co. *v.* Lamb, 143 Mass. 420. *Query* as to the result where the appointment of the agent was *ultra vires*, but the contract made by him with a third person was *intra vires*.

[7] *Post*, § 26.

§ 19. **Parties. — Partnerships as principals.**

In a partnership each member is usually a principal and also an agent in the management of the partnership affairs. As agent each partner has the authority necessary for carrying on the partnership,[1] and among other powers he has the power to appoint agents to carry out the purposes for which the partnership exists.[2] But if the appointment be to do an act which the partner could not do himself without special authorization from his co-partners, the appointment will not bind the firm.[3] And if the appointment requires to be made under seal it cannot be made except by the joint act of all the partners; but adding a seal to an instrument where none is necessary will not bring the appointment within this rule.[4] Where all of the partners have executed a sealed instrument, it seems that parol authority to one to fill in the name of the grantee is good.[5]

§ 20. **Parties. — Unincorporated clubs, etc., as principals.**

Unincorporated clubs and other voluntary associations, as churches, political organizations, and the like, are not competent principals because they are not legal entities. But their members are competent joint principals, and may be held as such if they have acted jointly in the appointment of an agent.[6] Mere membership in the club does not make them principals as to contracts made by the officers or committees of the club;[7] it must be shown that they authorized the agent of the club to act as their agent and pledge their credit. But this is a question not of the competency of the principal, but of the fact and extent of the agency.[8]

[1] Leake on Contr. (3d ed.) p. 451 and cases cited.

[2] Tillier *v.* Whitehead, 1 Dall. (Pa.) 269; Lucas *v.* Bank, 2 Stew. (Ala.) 280.

[3] Charles *v.* Eshleman, 5 Colo. 107.

[4] Lucas *v.* Bank, *supra;* Edwards *v.* Dillon, 147 Ill. 14.

[5] Cribben *v.* Deal, 21 Ore. 211. See Parsons on Partnership, § 122; *post*, § 26.

[6] Ray *v.* Powers, 134 Mass. 22.

[7] Flemyng *v.* Hector, 2 M. & W. 172; Hawke *v.* Cole, 62 L. T. Rep. N. S. 658; Ash *v.* Guie, 97 Pa. St. 493.

[8] *Post*, § 185.

§ 21. Parties. — Aliens as principals.

Aliens are generally as competent to create an agency as citizens or subjects. But an alien enemy cannot, during the continuance of a state of war, make any contract with a citizen of the United States which involves any communication across the lines of hostilities.[1] Accordingly he cannot appoint an agent in the United States during the continuance of the war.[2] But if he have an agent here at the outbreak of the war, the agency is not terminated or suspended for those purposes not involving a communication across the lines of hostilities, either between the principal and the agent or the agent and third persons.[3]

§ 22. Parties. — Joint principals.

Two or more persons may be jointly principals in a contract of agency. This has already been illustrated in the case of partnerships and unincorporated clubs.[4] In the case of a partnership each partner represents his co-partners and may bind them by the appointment of an agent. But joint-owners of property do not stand in this relationship, and each must assent for himself to the appointment of the agent in order to be bound as a principal.[5] If a joint power be given, it does not authorize the agent to act for one of the principals in matters affecting his individual interests.[6] In unincorporated associations, not being partnerships, one member does not represent the others, nor do a majority represent a minority, except by assent.[7]

[1] Kershaw *v.* Kelsey, 100 Mass. 561; United States *v.* Grossmayer, 9 Wall. (U. S.) 72.

[2] United States *v.* Grossmayer, 9 Wall. 72.

[3] Monsseaux *v.* Urquhart, 19 La. An. 482; Ward *v.* Smith, 7 Wall. (U. S.) 447.

[4] *Ante*, §§ 19, 20.

[5] Keay *v.* Fenwick, L. R. 1 C. P. Div. 745; Perminter *v.* Kelly, 18 Ala. 716.

[6] Gilbert *v.* How, 45 Minn. 121.

[7] Flemyng *v.* Hector, 2 M. & W. 172; Todd *v.* Emly, 7 M. & W. 427; Devoss *v.* Gray, 22 Oh. St. 159; Newell *v.* Borden, 128 Mass. 31.

§ 23. Parties. — Competency of agent.

Any person may, as to third persons, act as an agent,[1] unless, perhaps, one who is too young or too imbecile to perform at all the act in question.[2] So infants,[3] married women,[4] slaves,[5] and probably lunatics and other incompetents may be the channel of communication between a principal and one with whom he deals. Of course the contract of agency between the principal and the incompetent is subject to the usual rules governing contracts by persons under disability,[6] and the contract of warranty of authority[7] between the agent and the third party would be governed by like considerations.

As between the agent and principal, the agent may be disqualified by the fact that he has an interest in the subject-matter of the agency adverse to that of the principal.[8] As between the principal and a third person the agent may be disqualified by the fact that the agent is secretly acting for both of the parties to the contract to the knowledge of the third person; this would amount to a combination between the agent and the third party to defraud the principal.[9] So one cannot contract for himself in person and for another by representation, that is to say, an agent cannot contract with himself.

In cases where the Statute of Frauds requires a writing, signed by a party or his agent, the agent contemplated by the statute, who is to bind the party to be charged by signing

[1] Coke on Littleton, 52 *a*.

[2] Lyon *v.* Kent, 45 Ala. 656.

[3] Talbot *v.* Bowen, 1 A. K. Marsh. (Ky.) 436; *In re* D'Angibau, L. R. 15 Ch. D. 228.

[4] Hopkins *v.* Mollinieux, 4 Wend. (N. Y.) 465; Butler *v.* Price, 110 Mass. 97.

[5] Lyon *v.* Kent, *supra;* Chastain *v.* Bowman, 1 Hill's So. Car. Law. 270.

[6] Widrig *v.* Taggart, 51 Mich. 103.

[7] *Post*, § 90.

[8] Tewksbury *v.* Spruance, 75 Ill. 187; Crump *v.* Ingersoll, 44 Minn. 84; Taussig *v.* Hart, 58 N. Y. 425.

[9] Mayor, etc. of Salford *v.* Lever, L. R. 1891, 1 Q. B. 168; City of Boston *v.* Simmons, 150 Mass. 461.

the required memorandum, must be some third person and not the other contracting party.[1] An auctioneer selling for the vendor may himself, or through his clerk, make the memorandum which will bind both parties.[2] So also a broker.[3] But an auctioneer's implied authority to sign for the buyer is confined to the time of the sale and cannot be exercised at any later date.[4]

The law may fix the qualifications of agents, as in the case of attorneys-at-law, and in such cases only a duly licensed person can act as agent.[5]

§ 24. Parties. — Joint agents.

The agents entrusted with the authority from the principal may be either several or joint. The only question of difficulty connected with a joint agency is as to the manner in which it must be executed, and that may best be disposed of at this point.

Where the agency is joint, that is, where two or more persons are authorized jointly to act for the principal, the execution of the agency must generally be joint.[6] But whether the agency is joint or several is a matter of construction to be gathered from the terms of the authority and considerations of custom or necessity.[7] Two cases are clear in which the agency though confided to two or more persons is presumed to be several and not joint, so that one may act for all: the first is the case of a partnership acting as agent,[8]

[1] Wright *v.* Dannah, 2 Camp. 203; Farebrother *v.* Simmons, 5 B. & Ald. 333.

[2] Bird *v.* Boulter, 4 B. & Ad. 443; Gill *v.* Bicknell, 2 Cush. (Mass.) 355.

[3] Butler *v.* Thomson, 92 U. S. 412; Newberry *v.* Wall, 84 N. Y. 576; Coddington *v.* Goddard, 16 Gray (Mass.), 436.

[4] Horton *v.* McCarty, 53 Me. 394.

[5] Cobb *v.* Superior Court, 43 Mich. 289.

[6] Brown *v.* Andrew, 18 L. J. Q. B. 153; Commonwealth *v.* Canal Commissioners, 9 Watts (Pa.), 466.

[7] Guthrie *v.* Armstrong, 5 B. & Ald. 628; Hawley *v.* Keeler, 53 N. Y. 114.

[8] Deakin *v.* Underwood, 37 Minn. 98; Jeffries *v.* Ins. Co., 110 U. S. 305.

and the second is the case where the agency is a public one or one created by law;[1] or where the agency is that of directors of a corporation or a body of like powers.[2] In the first of these cases one of the joint agents may act for all, and in the second a majority may decide for all, provided a quorum meet and confer after due notice to all.[3]

§ 25. Parties. — Sub-agents.

Sub-agents may be appointed either, (1) by an agreement between the agent and the sub-agent in which the agent as to the sub-agent is principal, or (2) by an agreement between the agent and the sub-agent in which the agent acts for the principal. In the first case, a privity of contract or gratuitous relationship is created between the agent and the sub-agent; in the second case, a privity is created between the principal and the sub-agent, provided, of course, the agent, was expressly or impliedly authorized to make such an agreement for the employment of the sub-agent in behalf of his principal.[4] This subject is more fully discussed hereafter, more particularly with reference to the liability of the principal or agent for the conduct of the sub-agent.[5]

§ 26. Form of contract. — Writing or seal.

An agent may be appointed by oral communication, by writing, or by an instrument under seal. As a general rule the contract of agency may be by parol. The cases where it must be in writing or under seal may be summarized as follows: —

(1) Where by the terms of the contract it is not to be performed within a year, the contract is required by the Fourth Section of the English Statute of Frauds to be in writing.[6] If the contract may be performed within a

[1] Williams *v.* School District, 21 Pick. (Mass.) 75.

[2] McNeil *v.* Boston Chamber of Commerce, 154 Mass. 277.

[3] Bank *v.* Town, 52 Vt. 87; Williams *v.* School Dist., 21 Pick. (Mass.) 75.

[4] Haluptzok *v.* Great Northern Ry. Co., 55 Minn. 446; De Bussche *v.* Alt, 8 Ch. Div. 286.

[5] *Post*, §§ 92–95, 147, 160.

[6] Hinckley *v.* Southgate, 11 Vt. 428; Tuttle *v.* Swett, 31 Me. 555; Board *v.* Howell, (Ind.) 52 N. E. 769, 21 Ind. App. Ct. Rep. 495.

year,[1] or if it expressly contemplates a contingency, as death, which would terminate it within a year,[2] it need not be in writing. Whether both parties must sign in order to have mutual obligations and thus avoid the defence of want of mutuality has been variously decided,[3] but the weight of authority seems to be that mutuality is not necessary in such cases.[4]

(2) In some States the Statute of Frauds provides that, where a contract is required to be in writing and signed by the party to be charged, or his agent thereunto duly authorized, such authority to the agent shall be in writing.[5] Unless such express provision is added in the statute, the agent may be appointed orally although he must execute his authority in writing.[6] In these cases an auctioneer or broker may act for both parties in signing the required memorandum, but one party cannot act for the other.[7]

(3) Where the contract between the principal and the third party is required to be under seal, the authority of the agent to execute the instrument must itself be under seal.[8] A contract for the sale of the lands need not be under seal, although it must, under the Statute of Frauds, be in writing;[9] but a conveyance of the lands must be under seal, and the agent's authority to execute the conveyance must also be under seal. So also an authority to execute any specialty, as a bond, must be evidenced by a sealed instrument.[10] To this rule there are some

[1] Roberts *v.* Rockbottom Co., 7 Metc. (Mass.) 46; Russell *v.* Slade, 12 Conn. 455; Moore *v.* Fox, 10 Johns. (N. Y.) 244; Scribner *v.* Flagg Mfg. Co., 175 Mass. 536.

[2] Riddle *v.* Backus, 38 Iowa, 81; Updike *v.* Ten Broeck, 32 N. J. L. 105; Jilson *v.* Gilbert, 26 Wis. 637; Eiseman *v.* Schneider, 60 N. J. L. 291.

[3] See Wilkinson *v.* Heavenrich, 58 Mich. 574.

[4] Wood, St. of Frauds, § 405.

[5] See Stimson's Amer. Statute Law, Vol. I. § 5201.

[6] Johnson *v.* Dodge, 17 Ill. 433; Long *v.* Hartwell, 34 N. J. L. 116.

[7] *Ante*, § 23.

[8] Berkeley *v.* Hardy, 5 B. & C. 355, 8 D. & R. 102; Hanford *v.* McNair, 9 Wend. (N. Y.) 54; Gordon *v.* Bulkeley, 14 Serg. & R. (Pa.) 331.

[9] Long *v.* Hartwell, 34 N. J. L. 116.

[10] Gordon *v.* Bulkeley, *supra;* Hibblewhite *v.* McMorine, 6 Mees. & W. 200.

apparent exceptions. First, if the specialty be executed by the agent in the presence of the principal, the agent's authority need not be under seal,[1] and the grantee may sign the grantor's name provided the latter afterward acknowledges and delivers the deed.[2] Second, if the seal is superfluous in the sense that the instrument though actually sealed need not be sealed in order to be valid, the seal may be disregarded and a parol authority will be sufficient.[3] Third, if a corporation executes a specialty the agent's authority to execute it and affix the corporate seal need not itself be under seal; it is enough that the authority has been conferred by a vote of the directors.[4] Fourth, the rule has also been greatly relaxed in the case of partnerships, and many jurisdictions have held that one partner may be authorized by parol to execute specialties in the partnership name.[5]

(4) If a deed be executed by the grantor, but with blanks left in it, may the grantor by parol authorize an agent to fill the blanks and deliver the deed? It is settled that a parol authority is sufficient for the delivery of a deed.[6] The older authorities denied, however, that a parol authority was sufficient for the filling of blanks in a deed.[7] The modern authorities in the United States are strongly in favor of the view that where the agent acting under parol authority fills the blanks before or at the time of delivery, the deed is effective as delivered.[8] It is very generally held that this is so in cases where the grantee is ignorant that such parol authority

[1] Gardner *v.* Gardner, 5 Cush. (Mass.) 483; Eggleston *v.* Wagner, 46 Mich. 610; Jansen *v.* McCahill, 22 Cal. 563; King *v.* Longnor, 4 Barn & Adol. 647.

[2] Clough *v.* Clough, 73 Me. 487.

[3] Worrall *v.* Munn, 5 N. Y. 229; Alcorn's Exec. *v.* Cook, 101 Pa. St. 209; Wagoner *v.* Watts, 44 N. J. L. 126; Thomas *v.* Joslin, 30 Minn. 388. *Contra*, Wheeler *v.* Nevins, 34 Me. 54; Pollard *v.* Gibbs, 55 Ga. 45

[4] Burrill *v.* Nahant Bank, 2 Met. (Mass.) 163; Howe *v.* Keeler, 27 Conn. 538; Fitch *v.* Lewiston Steam Mill Co., 80 Me. 34.

[5] Burdick on Partnership, pp. 188–193; Smith *v.* Kerr, 3 N. Y. 144.

[6] Parker *v.* Hill, 8 Met. (Mass.) 447.

[7] Sheppard's Touchstone, 54; Hibblewhite *v.* McMorine, 6 Mees. & W. 200.

[8] Cribben *v.* Deal, 21 Ore. 211, and cases there cited.

has been conferred and exercised, the decision in such cases being put upon the ground of estoppel.[1] This doctrine is not applicable to a case where a married woman who can not appoint an agent to execute the deed, but must execute and acknowledge it in person, executes and acknowledges a deed with blanks, and seeks to authorize an agent to fill the blanks.[2]

(5) In England, subject to various exceptions, it seems to be the rule that all appointments of agents by corporations, other than trading corporations, must be under the corporate seal.[3] In the United States no such rule seems to be recognized.[4]

§ 27. Legality of object.

A contract of agency must not contemplate an illegal object. Accordingly a contract of agency for dealing in futures where the object is to bet on the rise or fall of prices,[5] or for lobbying,[6] or selling smuggled goods,[7] or for procuring a marriage contract,[8] or for improperly influencing the action of a third person, as by assuming to advise as a friend when the adviser is secretly the agent of one who is to profit by the advice,[9] or for any other object opposed to law, or public policy, or good morals, is unenforceable.[10] The whole matter is a part of the general law of contract.[11]

[1] Phelps *v.* Sullivan, 140 Mass. 36; Campbell *v.* Smith, 71 N. Y. 26. *Contra:* Upton *v.* Archer, 41 Cal. 85.

[2] Drury *v.* Foster, 2 Wall. (U. S.) 24.

[3] Austin *v.* Guardians of Bethnal Green, L. R. 9 C. P. 91; Arnold *v.* Poole, 4 M. & G. 860; Sutton *v.* Spectacle Makers Company, 10 L. T. Rep. 411.

[4] 1 Morawetz on Corp. § 338; Bank *v.* Patterson, 7 Cranch, 299.

[5] Irwin *v.* Williar, 110 U. S. 499.

[6] Trist *v.* Child, 21 Wall. (U. S.) 441; Mills *v.* Mills, 40 N. Y. 543.

[7] Armstrong *v.* Toler, 11 Wheat. (U. S.) 258.

[8] Duvall *v.* Wellman, 124 N. Y. 156.

[9] Byrd *v.* Hughes, 84 Ill. 174; Bollman *v.* Loomis, 41 Conn. 581.

[10] Stout *v.* Ennis, 28 Kans. 706; Nichols *v.* Mudgett, 32 Vt. 546; Keating *v.* Hyde, 23 Mo. App. 555; White *v.* Equitable, &c. Union, 76 Ala. 251; Elkhart County Lodge *v.* Crary, 98 Ind. 238. See *post*, § 83.

[11] Huffcut's Anson on Cont. pp. 225–273.

2. *Gratuitous Agency.*

§ 28. Gratuitous agency as between principal and third person.

The question of gratuitous agency resolves itself into two parts: (1) as to the liability of a principal to third persons where he acts through a gratuitous agent; (2) as to the liability of the agent to the principal or to third persons where the agent serves without compensation.

The first phase of the question affords little difficulty. One who acts through another is liable to third persons in the same way as if he had acted without the intervention of an agent, and so far as the third person is concerned it is wholly immaterial whether the agent acts for the principal for compensation or gratuitously.[1] The sole inquiry is, had the agent authority to act for the principal? If so, the principal is bound by the agent's act within the apparent scope of the authority. But the doctrines as to the competency of the principal apply to a gratuitous agency in the same way as to an agency by contract.[2]

§ 29. Gratuitous agency as between principal and agent.

It is a fundamental dogma of the English law that a consideration is necessary to support a promise. Accordingly a gratuitous promise by an agent to perform an act for the principal is unenforceable. If the agent enters upon the performance of the act, then he may be liable for the negligent manner in which he performs it, either, as is sometimes said, because the consideration then arises from the fact that the principal suffers a detriment in parting with his control over the subject-matter of the agency, or, as is more accurately said, because one who voluntarily meddles with the property rights or *quasi* property rights of another is bound to act as an ordinarily prudent man would act under like circumstances.[3]

The main difference therefore between an agency by con-

[1] Haluptzok *v.* Great Northern Ry., 55 Minn. 446.

[2] *Ante*, §§ 14–22.

[3] Thorne *v.* Deas, 4 Johns. (N. Y.) 84; Whitehead *v.* Greetham, 2 Bing. 464; Pollock on Cont. (6th ed.) pp. 170–171; 2 Law Q. Rev. 33.

tract and a gratuitous agency lies in the fact that the former may be enforced while it remains unacted upon by either party, while the latter can be enforced only when it has been acted upon by the agent, and he has, by his act, involved the interests and rights of the principal. But of this hereafter.[1]

[1] *Post*, §§ 97, 98.

CHAPTER III.

FORMATION OF THE RELATION BY RATIFICATION.

§ 30. Meaning of the term.

(1) *Ratification generally.* The assent of the principal to the act of the agent may be given either before the act is performed, or after it is performed. When given before it is performed, the assent is in the nature of an appointment of the agent for the performance of the act as explained in the preceding chapter. When given after the act is performed, it is in the nature of a ratification of the act, and is intended to clothe the act with the same qualities as if there had been a prior appointment. Two cases of ratification are clearly distinguishable: first, where the agent had no prior authority for any purpose and the ratification operates as an appointment as agent and as authority to do the act ratified; second, where the agent had some prior authority, but exceeded it in the act in question, and the ratification operates as an extension of the authority so as to cover the act ratified.

(2) *Statement of doctrine.* Subject to the exceptions hereafter mentioned,[1] where one person, whether no agent for any purpose or an agent exceeding his authority, does an act as agent in the name of or on behalf of another in excess of authority (if any) conferred upon him, the person in whose name or on whose behalf the act was done may ratify the act and thereby give to it the same legal effect as if the one doing it had been in fact an agent, or, being an agent for some purposes, had been in fact authorized to do the act in question.[2]

[1] *Post*, §§ 42–44.

[2] Y. B. 7 H. IV. 34, *pl.* 1; Wilson *v.* Tumman, 6 M. & G. 236; Philadelphia, &c. R. *v.* Cowell, 28 Pa. St. 329; McCracken *v.* San Francisco, 16 Cal. 591; Grant *v.* Beard, 50 N. H. 129; Dempsey *v.* Chambers, 154 Mass. 330, where the history of ratification is given, and it is shown that the doctrine applies to master and servant as well as to principal and agent.

When such unauthorized act comes to the knowledge of the one in whose name or on whose behalf it was assumed to be performed, he has an election either to repudiate the act or to ratify and adopt it. If he elects to accept it, the acceptance or adoption of it constitutes a ratification, and relates back to the time the act was performed in such manner as to involve the principal and third person on the one hand, and the principal and agent on the other, in the same legal consequences as would have ensued had the act been authorized in advance. The principal's option to repudiate or ratify secures to him a certain advantage in creating a contract relation which is anomalous, but which the law permits him to enjoy.[1] But in order that he shall have this advantage, it is necessary that a contract shall actually have been consummated prior to the attempted ratification.[2]

The subject of ratification falls into two main heads: (1) Elements, or conditions, of ratification; (2) Legal effects of ratification.

1. *Elements of Ratification.*

§ 31. Analysis of elements.

The essential elements or conditions of ratification are as follows: (1) An act performed by an "agent" in behalf of an existing "principal;" (2) The subsequent real assent of the principal to the act so performed in his behalf; (3) The competency of the principal to give a binding assent; (4) In some cases an assent expressed in a particular form; (5) The legality of the act ratified; (6) Exceptions to the doctrine.

§ 32. (I.) Act performed in behalf of existing principal.

Two elements must concur before the basis for ratification can be said to be laid: (1) The principal must be an existing person capable of being ascertained, and (2) The contract must have been made in the name of and in behalf of such existing and ascertainable person.

[1] Hagedorn *v.* Oliverson, 2 M. & S. 485; Williams *v.* North China Insurance Co., L. R. 1 C. P. D. 757.

[2] Whiting *v.* Mass. &c. Ins. Co., 129 Mass. 240.

(1) The principal must be an existing person. If an agent professes to make a contract in behalf of a corporation to be formed, but not yet in existence, the contract is incapable of ratification after the corporation has a legal existence.[1] The corporation may make a new contract upon the same terms as the original one, but this is a different matter from ratification. It is one thing to intend to ratify and to proceed upon the assumption that there is a ratification, and another thing to intend to make a contract and to proceed upon that assumption.[2] But if after the incorporation the company is found in possession of property or benefits accepted under the terms of the contract, this may be equivalent to proof of a new contract on the terms of the original one or of a novation.[3] This comes very near the line of ratification, but is distinguishable from it in theory.[4] Some courts treat the case as one of ratification,[5] but this is not justified under the general doctrine, unless, indeed, it be upon the theory that the court looks beyond the corporate entity and fixes upon the stockholders as the real principals.[6]

(2) The contract must be professedly made in behalf of such existing principal. It seems to be the prevailing American rule that in order that a person may ratify an act of another, the act must have been done *professedly* in the name of, and on behalf of, the one so ratifying, — in other words, that where the act is done in the name of the actor, without naming or disclosing any other person, there can be no ratification, even though the actor was in fact acting in behalf of an undisclosed principal.[7]

[1] Kelner *v.* Baxter, L. R. 2 C. P. 174; Abbott *v.* Hapgood, 150 Mass. 248.

[2] *In re* Northumberland Avenue Hotel Co., L. R. 33 Ch. D. 16; Stainsby *v.* Frazer's Co., 3 Daly (N. Y. C. P.), 98.

[3] McArthur *v.* Times Printing Co., 48 Minn. 319.

[4] Howard *v.* Patent Ivory Co., L. R. 38 Ch. D. 156; Paxton Cattle Co. *v.* First National Bank, 21 Neb. 621; Bell's Gap R. R. *v.* Christy, 79 Pa. St. 54; Rockford, &c. R. *v.* Sage, 65 Ill. 328.

[5] Whitney *v.* Wyman, 101 U. S. 392; Oakes *v.* Cattaraugus Water Co., 143 N. Y. 430.

[6] See Morawetz on Corp. §§ 547–549.

[7] Hamlin *v.* Sears, 82 N. Y. 327; Grund *v.* Van Vleck, 69 Ill. 478;

This is now unquestionably the English rule. Where an agent made a contract in his own name for the benefit of an undisclosed principal, but without authority from that principal, it was held by the House of Lords in the recent case of *Keighley* v. *Durant*,[1] that there could be no ratification. This had previously been assumed to be the English law.[2] But the majority of the Court of Appeal held that the undisclosed principal might ratify.[3] The House of Lords unanimously reversed this holding, and laid down the doctrine that if one makes a contract in his own name, not purporting to act on behalf of a principal, but having a secret intention to act, though without authority, for a principal, the contract so made cannot be ratified by the undisclosed principal so as to enable him to sue or render him liable to be sued upon it. "The whole hypothesis of ratification is, that the ultimate ratifier is already in appearance the contractor, and that by ratifying he holds as done for him what already bore, purported or professed to be done for him. There is no room for ratification (unless all the world may ratify) until the credit of another than the agent has been pledged to the third party."[4]

If A. makes a contract in the name and on behalf of B., C. cannot, by an attempted ratification, take advantage of it, nor can C. ratify it so as to become liable upon it.[5] If A. makes the contract in his own name, and really on his own behalf, B. cannot in any way become a party to it.[6] If A makes the

Herd *v.* Bank of Buffalo, 66 Mo. App. 643; Pittsburg, &c. R. *v.* Gazzam, 32 Pa. St. 340; Western Pub. House *v.* Dist. Tp. of Rock, 84 Iowa, 101.

[1] 1901, A. C. 240.

[2] Matheson *v.* Kilburn, 1 Sm. L. C. (10th ed.) p. 349; Saunderson *v.* Griffith, 5 B. & C. 909; Wilson *v.* Tumman, 6 M. & G. 236; Watson *v.* Swan, 11 C. B. N. S. 756; dissenting opinion of A. L. Smith, L. J., in Durant *v.* Roberts, 1900, 1 Q. B. 629, 633.

[3] Durant *v.* Roberts, 1900, 1 Q. B. 629.

[4] Lord Robertson in Keighley *v.* Durant, 1901, A. C. 240, 259.

[5] Saunderson *v.* Griffith, 5 B. & C. 909; Jones *v.* Hope, 3 Times L. Rep. 247; Hawke *v.* Cole, 62 Law Times, 658.

[6] Boulton *v.* Jones, 2 H. & N. 564; Boston Ice Co. *v.* Potter, 123 Mass. 28.

contract in his own name as principal, but really on behalf of an undisclosed principal, the latter cannot ratify it.[1]

Under the rule that the principal must be disclosed as a condition precedent to ratification, it has been held that it is enough that some person who may be ascertained and identified is referred to. Thus insurance may be effected in behalf of all persons, generally, who may be shown to be interested, and any person actually interested may ratify.[2] So also one may act in behalf of an heir or administrator or owner, though not specifically identified, and if such person is capable of being ascertained, he may ratify.[3]

Whether a sheriff, in making a levy without special instructions, acts on behalf of an attaching creditor or as an officer of the court serving in a public capacity, lies at the root of a difference of judicial opinion as to whether an unauthorized and wrongful levy may be ratified. The leading English case holds there can be no ratification,[4] but some American cases hold that there may be a ratification.[5]

§ 33. (II.) Assent of the principal.

Ratification, like prior authority by agreement, rests on assent. The assent of the agent is already given by his assuming to act. The assent of the third party is already given by his entering into the contract.[6] The assent of the principal is therefore all that is required to make the contract binding on him and on the third person. Much the same considerations govern the doctrine of assent in ratification as govern the assent in the acceptance of an offer.[7] These may

[1] Keighley *v.* Durant, *supra.*

[2] Hagedorn *v.* Oliverson, 2 M. & S. 485.

[3] Foster *v.* Bates, 12 M. & W. 226; Lyell *v.* Kennedy, 14 App. Cas. 437.

[4] Wilson *v.* Tumman, 6 M. & G. 236.

[5] Brainerd *v.* Dunning, 30 N. Y. 211.

[6] As to whether he can withdraw his assent before ratification, see *post*, § 38.

[7] Yet it must not be supposed that ratification is a contract. It is an election to regard a prior acceptance by an unauthorized agent as the assent of the principal. Metcalf *v.* Williams, 144 Mass. 452.

be summarized as follows: (1) The assent may be express or implied. (2) Silence is not (ordinarily) assent. (3) Assent must be *in toto* and unconditional. (4) Assent must be free from mistake or ignorance as to facts, and from fraud. A further consideration involves the question: (5) Has the third party a right to recede before ratification by the principal?

§ 34. — (1.) Assent may be express or implied.

Except in cases where a particular form is necessary, the ratification may be either by express words or by conduct. All that the law requires is such a manifestation of the intent of the principal to adopt the act of the agent as would lead the ordinarily prudent man to conclude that the principal has assented. The main difference between the two methods is in the nature of the proof offered to establish the ratification. One other difference has to do with the question whether the principal knew all the material facts when he manifested his assent. If he has expressly adopted the act there may be a presumption that he has either learned all the material facts or has learned all he cares to know of them, and has deliberately assumed the risk as to the others;[1] while if he has impliedly adopted the act, the conduct relied on to establish the assent must have a greater or less probative force according as the principal knows or does not know the facts to which his conduct is sought to be related.[2] While, therefore, the knowledge of the principal of the material facts connected with the transaction is a material element in ratification,[3] the difficulties of establishing such actual knowledge increase or diminish according as the ratification is by conduct or by words.[4]

(1) *Express Ratification.* Express ratification, like express authority, may ordinarily be in any form, parol or written, and if written, sealed or unsealed.[5] Where, however, a prior

[1] Kelley *v.* Newburyport Horse R., 141 Mass. 496.
[2] Combs *v.* Scott, 12 Allen (Mass.), 493.
[3] *Post*, § 37.
[4] Hyatt *v.* Clark, 118 N. Y. 563.
[5] *Ante*, § 26.

authority would require to be in any particular form, a subsequent ratification must be in like form. This general rule is subject to some qualifications to be considered hereafter.[1] It seems that an express ratification must be addressed to the other contracting party, or intended to be communicated to him; a mere declaration to a stranger is not sufficient.[2]

(2) *Ratification by Conduct.* Any conduct by the principal which would lead a reasonable man to conclude that the principal is manifesting an intent to be bound by the agent's contract will be deemed a ratification. This conduct may assume an endless variety of forms. Only a few of these can be here mentioned by way of illustration. By accepting benefits under the contract, a principal will be held to have ratified it. "No rule of law is more firmly established than the rule that if one, with full knowledge of the facts, accepts the avails of an unauthorized treaty made in his behalf by another, he thereby ratifies such treaty, and is bound by its terms and stipulations as fully as he would be had he negotiated it himself." [3] By bringing an action on the contract, a principal will be held to have ratified it, whether the action be against the third person or against the agent for the proceeds of the contract.[4] Ratification may be after action is brought by another in the name of the one ratifying.[5] Where A has received the rents of property for years without authority, an action by the owner for an accounting is a sufficient ratification to render A an agent as from the beginning.[6] By promising to pay the agent's commissions

[1] *Post*, § 40.

[2] Rutland, &c. R. *v.* Lincoln, 29 Vt. 206.

[3] Strasser *v.* Conklin, 54 Wis. 102; Hyatt *v.* Clark, 118 N. Y. 563; Pike *v.* Douglass, 28 Ark. 59; Thomas *v.* City N. B., 40 Neb. 501; Wheeler, &c. Co. *v.* Aughey, 144 Pa. St. 398.

[4] Bank of Beloit *v.* Beale, 34 N. Y. 473; Partridge *v.* White, 59 Me. 564; Frank *v.* Jenkins, 22 Oh. St. 597; Merrill *v.* Wilson, 66 Mich. 232; Benson *v.* Liggett, 78 Ind. 452; Ferguson *v.* Carrington, 9 B. & C. 59.

[5] Ancona *v.* Marks, 7 H. & N. 686. *Contra*, Wittenbrock *v.* Bellmer, 57 Cal. 12.

[6] Lyell *v.* Kennedy, 14 App. Cas. 437.

after full knowledge of the unauthorized contract, the principal ratifies the act.[1] Even an express declaration of repudiation of the contract may be overcome by subsequent conduct, but the proof should be clear and decisive.[2]

§ 35. — (2) Ratification by silence.

It is a general rule in the law that silence does not give consent,[3] and this is modified only by the consideration that in some special circumstances good faith may require a man to speak or be thereafter estopped by his silence. In the application of these principles to the doctrine of ratification it is necessary to distinguish at the outset between an unauthorized act by one who has no authority to act at all, and a like act by one who has some authority to act but who has exceeded his authority.

(1) *Unauthorized Act by Stranger.* Mere silence by one in whose behalf a stranger has assumed to act would not probably be sufficient evidence of ratification, although, in connection with other circumstances, it might be some evidence.[4] Circumstances may also be present, which, coupled with the silence of the supposed principal, would lead a reasonable man to believe that an agency did in fact exist. In such a case a duty seems to be laid upon the supposed principal to speak in order not to mislead the third party to his injury.[5] The question is after all one as to the *sufficiency* and not the *kind* of evidence, and it is clear that silence in one set of circumstances would not have the same evidential force as in another set of circumstances. "It is one thing to say that the law will not imply a ratification from silence, and a very different thing to say that silence is a circumstance from which, with others, a jury may imply it."[6]

[1] Gillett *v.* Whiting, 141 N. Y. 71.

[2] Cornwal *v.* Wilson, 1 Ves., Sr., 509; City of Findlay *v.* Pertz, 66 Fed. Rep. 427.

[3] Royal Ins. Co. *v.* Beatty, 119 Pa. St. 6.

[4] Ward *v.* Williams, 26 Ill. 447; Philadelphia, &c. R. *v.* Cowell, 28 Pa. St. 329.

[5] Heyn *v.* O'Hagen, 60 Mich. 150; Saveland *v.* Green, 40 Wis. 431.

[6] Phil. &c. R. *v.* Cowell, *supra.*

(2) *Unauthorized Act by Agent.* Where an agent exceeds his authority, and the principal, after knowledge of the transaction, remains silent, such silence may in itself be sufficient evidence of ratification.[1] In some cases it may amount to conclusive evidence of ratification.[2] The evidential force of the silence is much greater and more cogent where an agency actually exists than where the act is that of a stranger, because the circumstances of the case demand more imperatively that the principal should speak. The time within which he must speak is to be determined by the facts of the case. It must be a reasonable time after he learns of the unauthorized act.[3]

§ 36. — (3) Assent must be in toto and unconditional.

The principal must ratify the whole act or disaffirm the whole. He cannot ratify as to a part and disaffirm as to the rest.[4] A man cannot take the benefits of a contract without bearing its burdens.[5] The principle is fundamental and axiomatic. Accordingly the ratification of part of a transaction operates as a ratification of the whole.[6] So also ratifying an unauthorized act or transaction is a ratification of torts that may have been committed in the doing of it.[7]

§ 37. — (4) Assent must be free from mistake or fraud.

In order that the ratification may be binding it is necessary that it should be genuine, that is, it must be the free and intelligent act of the principal. Several circumstances may

[1] Fothergill *v.* Phillips, L. R. 6 Ch. App. 770; Kent *v.* Quicksilver Mining Co., 78 N. Y. 159; Mobile, &c. Ry. *v.* Jay, 65 Ala. 113.

[2] Lee *v.* Fontaine, 10 Ala. 755; Jones *v.* Atkinson, 68 Ala. 167; Alexander *v.* Jones, 64 Iowa, 207.

[3] Mobile, &c. Ry. *v.* Jay, *supra.*

[4] Smith *v.* Hodson, 4 T. R. 211; Brigham *v.* Palmer, 3 Allen (Mass.), 450; Eberts *v.* Selover, 44 Mich. 519; Mundorff *v.* Wickersham, 63 Pa. St. 87; Billings *v.* Mason, 80 Me. 496.

[5] Bristow *v.* Whitmore, 9 H. L. Cas. 391, 404; Rudasill *v.* Falls, 92 N. C. 222.

[6] Wilson *v.* Poulter, 2 Str. 859; Bristow *v.* Whitmore, 9 H. L. Cas. 391.

[7] Dempsey *v.* Chambers, 154 Mass. 330.

intervene to prevent the reality of the assent, the chief among these being mistake and fraud.

(1) *Mistake.* The most obvious ground of mistake is that the principal ratified the act believing certain facts to exist when in reality the facts were otherwise. "The general rule is perfectly well settled, that a ratification of the unauthorized act of an agent, in order to be effectual and binding on the principal, must have been made with a full knowledge of all material facts, and that ignorance, mistake, or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified will absolve the principal from all liability by reason of any supposed adoption or assent to the previously unauthorized act of an agent."[1] While the rule is clear that the principal must know all the material facts before the ratification will become binding, or, rather, that upon discovery of his mistake he may avoid the ratification, the application of the rule calls for some additional consideration. The first is that the principal may choose to ratify knowing that he is ignorant of all the circumstances. In such a case he assumes the risk with knowledge of his ignorance, and is not misled or deceived.[2] The second consideration is that, where the agent was authorized to act, but departed from his instructions, there is a presumption that the principal knows all the facts. This presumption grows out of the doctrine of agency, — that the knowledge of the agent is the knowledge of the principal, since it is the duty of the agent to disclose to his principal all the facts connected with the agency.[3] This consideration would not prevail where the act was that of a stranger, nor is it admitted as correct in all cases of unauthorized acts by agents.[4] The third consideration is that it is not necessary that the principal should have knowledge

[1] Combs *v.* Scott, 12 Allen (Mass.), 493; Lewis *v.* Read, 13 M. & W. 834; Freeman *v.* Rosher, 13 Q. B. 780.

[2] Kelley *v.* Newburyport Horse R., 141 Mass. 496; Lewis *v.* Read, *supra;* Fitzmaurice *v.* Bayley, 6 El. & B. 868.

[3] Meehan *v.* Forrester, 52 N. Y. 277; Hyatt *v.* Clark, 118 N. Y. 563. *Post*, § 141.

[4] Combs *v.* Scott, 12 Allen (Mass.), 493.

of all collateral circumstances so long as he has knowledge of the main transaction.[1]

(2) *Fraud.* If the principal is induced to ratify the contract by the fraud of the third party he can, of course, avoid the ratification.[2]

§ 38. — (5) **Has the third party a right to recede before ratification?**

It is a disputed question whether the third party who has entered into a contract with an unauthorized agent has a right to recede from the contract at any time before ratification.

In England it is held that he has not a right to recede on the ground that the contract with the agent binds the third party, though it does not bind the principal, and that a subsequent ratification by the principal relates back to the time when the contract was formed, and places the parties in the same position as if the agent had had prior authority.[3] "It comes to this, that if an offer to purchase is made to a person who professes to be the agent for a principal, but who has no authority to accept it, the person making the offer will be in a worse position as regards withdrawing it than if it had been made to the principal; and the acceptance of the unauthorized agent in the mean time will bind the purchaser to his principal, but will not in any way bind the principal to the purchaser."[4] This view is further supported by some text-writers, and in occasional *dicta* of American judges.[5] While this is the holding of the English courts on this point, they hold that the third person and the unauthorized agent may by mutual assent release the third person from any obligations under the contract at any time before ratification.[6]

[1] Hilbery *v.* Hatton, 2 H. & C. 822; Dempsey *v.* Chambers, 154 Mass. 330.

[2] Owings *v.* Hull, 9 Pet. (U. S.) 607.

[3] Bolton Partners *v.* Lambert, L. R. 41 Ch. D. 295.

[4] North, J., in *In re* Portuguese, &c. Mines, L. R. 45 Ch. D. 16, 21.

[5] Wharton on Agency, §§ 876–877; Story on Agency, §§ 245–248; Andrews *v.* Ætna Life Ins. Co., 92 N. Y. 596, 604.

[6] Walter *v.* James, L. R. 6 Ex. 124; Stillwell *v.* Staples, 19 N. Y. 401.

In the United States the doctrine generally prevails that the third person may recede from the contract at any time before ratification, on the ground that prior to ratification there is no mutuality, and that if one party is free to be bound or not bound, the other must also be free.[1] The decisions in *Dodge* v. *Hopkins* and *Clews* v. *Jamieson*[2] actually go beyond this point, and hold the unauthorized contract a nullity, and a subsequent ratification also a nullity unless assented to by the third party. But this is obviously too refined for the necessities of business. It is better to treat the contract between the third person and the agent as in the nature of an offer to the principal, which the latter may accept or reject by an election operating upon the previous unauthorized acceptance by the agent. It differs from an ordinary offer in contract mainly in this, that it remains open until actually withdrawn by notice to the principal or the agent, whereas an ordinary offer lapses by the expiration of time. This avoids the extremes of the English doctrine on the one hand, which treats the unauthorized contract as in effect an irrevocable offer, and of the doctrine of *Dodge* v. *Hopkins* on the other hand, which treats it as in effect no offer at all. The case is an anomalous one at best and requires anomalous treatment.[3]

§ 39. (III.) Principal must be competent.

The competency of the principal has already been discussed.[4] The same considerations prevail in respect of the competency of the principal to ratify an act as to authorize it. An infant may ratify, if he could, by appointing an agent, authorize;[5] but his ratification is not conclusive.[6] If his appointment of

[1] Dodge *v.* Hopkins, 14 Wis. 630; Atlee *v.* Bartholomew, 69 Wis. 43; Townsend *v.* Corning, 23 Wend. (N. Y.) 435; Clews *v.* Jamieson, 89 Fed. Rep. 63. See also Wilkinson *v.* Heavenrich, 58 Mich. 574; McClintock *v.* South Penn. Oil Co., 146 Pa. St. 144, 161–162.

[2] This, however, was the case of an undisclosed principal, and must be considered in connection with the doctrines of § 32, *ante*.

[3] See 9 Harv. Law Rev. 60; 5 Am. St. Rep. 109.

[4] *Ante*, §§ 15–22.

[5] Patterson *v.* Lippincott, 47 N. J. L. 457.

[6] McCracken *v.* San Francisco, 16 Cal. 591, 623–624; Armitage *v.* Widoe, 36 Mich. 124.

an agent would be void, then he cannot ratify even after coming of age.[1] If a married woman can appoint an agent, she may ratify the act of one who has represented her without authority.[2] Corporations may ratify either by vote of the directors where they would have power to authorize,[3] or by vote of stockholders where the act could be authorized only by them.[4] Acquiescence of stockholders may amount to ratification.[5] One partner may ratify for the firm.[6] Voters may ratify or disaffirm the unauthorized act of the agents of a municipal or quasi-public corporation.[7] A state, through the legislature, may ratify the unauthorized acts of agents.[8] Where an agent has authority to do an act he may, in behalf of his principal, ratify the like unauthorized act of another agent, but not, it seems, of one who is not an agent for any purpose.[9]

The matter presents itself in several aspects: (1) The principal may have been competent when the act was done and competent when it was ratified; (2) he may have been incompetent when it was done and incompetent when it was ratified; (3) he may have been competent when it was done and incompetent when it was ratified; (4) he may have been incompetent when it was done and competent when it was ratified. The first three cases call for no special comment. In the first, the ratification is clearly binding. In the second and third, it is as clearly not conclusively binding.

The fourth case presents a difficulty. If the incompetent could have appointed an agent, subject only to his right to disaffirm the contract of agency, then clearly he could, on arriving at competency, affirm the agency and thereby ratify the

[1] Trueblood *v.* Trueblood, 8 Ind. 195.

[2] McLaren *v.* Hall, 26 Iowa, 297.

[3] Wilson *v.* West Hartlepool, &c. Ry., 2 De G., J. & S. 475.

[4] Spackman *v.* Evans, L. R. 3 H. L. 171; Grant *v.* Ry., 40 Ch. Div. 135.

[5] London, &c. Ass'n *v.* Kelk, 26 Ch. Div. 107; Evans *v.* Smallcombe, L. R. 3 H. L. 249.

[6] Forbes *v.* Hagman, 75 Va. 168.

[7] School District *v.* Ætna Ins. Co., 62 Me. 330.

[8] Wisconsin *v.* Torinus, 26 Minn. 1; People *v.* Denison, 80 N. Y. 656

[9] Ironwood Stove Co. *v.* Harrison, 75 Mich. 197.

acts of the agent.[1] So, it would seem, he could ratify unauthorized acts of that agent as well as authorized acts. So, too, he could ratify the acts of one who assumed to represent him without any authority. But if the appointment of an agent by the incompetent would be void (as in some States in case of infancy), then clearly the act could not have been authorized when it was performed. How then could it be ratified after it was performed? The conclusion is that the act so done by an agent cannot be ratified.[2] But this is dependent upon the answer to the question whether the infant could have appointed the agent.[3]

§ 40. (IV.) Form of ratification.

It has already been seen that, with the exception of a few cases, the authority of an agent may be conferred without any formality whatever. The same general rule applies to ratification. Unless the case is one in which the authority, if conferred in the first instance, must have been under seal or in writing, the ratification may be by parol.[4]

(1) *Ratification of agent's contract under seal.* Authority to execute a contract which is required to be under seal, must be conferred by an instrument under seal, and consequently the unauthorized execution of such a contract can be ratified only by an instrument of equal formality.[5] But the constantly growing tendency to do away with the formality of a seal has led to an exception to the above rule, and it seems now to be generally recognized that the execution of a sealed instrument by a partner in the firm name may be ratified by the other partner by parol.[6] The Massachusetts court goes

[1] Coursolle *v.* Weyerhauser, 69 Minn. 328.

[2] Trueblood *v.* Trueblood, 8 Ind. 195; Armitage *v.* Widoe, 36 Mich. 124.

[3] See *ante*, § 15.

[4] Goss *v.* Stevens, 32 Minn. 472; Taylor *v.* Conner, 41 Miss. 722.

[5] Hanford *v.* McNair, 9 Wend. (N. Y.) 54; Heath *v.* Nutter, 50 Me. 378; Spofford *v.* Hobbs, 29 Me. 148; Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205; Pollard *v.* Gibbs, 55 Ga. 45; Oxford *v.* Crow, 1893, 3 Ch. 535.

[6] Peine *v.* Weber, 47 Ill. 41; Holbrook *v.* Chamberlin, 116 Mass. 155

still further and holds that a parol ratification is sufficient, even in cases where the unauthorized execution of the sealed instrument is in the name of an individual.[1] Of course, if the sealed instrument is one upon which no seal is necessary, the seal may be regarded as mere surplusage and the instrument ratified by parol.[2]

(2) *Ratification of contract required by Statute of Frauds to be in writing.* Unless the statute provides otherwise, a contract required by the Statute of Frauds to be in writing may be ratified by parol.[3] It has been seen that in some States the Statute of Frauds provides that where a contract is required to be in writing and signed by the party to be charged, or his agent thereunto duly authorized, such authority to the agent must also be in writing.[4] Under the rule stated above, it seems clear that when such a contract is executed by the agent without due authorization, his act can be ratified only by an instrument in writing.[5] It is held in one State, however, that a parol ratification is sufficient.[6] If the agent had written authority, but departed from it by signing a contract not authorized by the instrument of agency, a parol ratification of the contract as signed is unavailing.[7]

§ 41. (V.) Legality or validity of act ratified.

It is a general rule that the principal may ratify any act which he could have authorized,[8] and whether lawful or unlaw-

[1] McIntyre *v.* Park, 11 Gray (Mass.), 102; Holbrook *v.* Chamberlin, 116 Mass. 155.

[2] Adams *v.* Power, 52 Miss. 828.

[3] Maclean *v.* Dunn, 4 Bing. 722.

[4] *Ante*, § 26.

[5] McDowell *v.* Simpson, 3 Watts (Pa.), 129; Hawkins *v.* McGroarty, 110 Mo. 546. This view finds some support in the case of Ragan *v.* Chenault, 78 Ky. 545, in which it is held that where a statute provides that an agent cannot make a contract of suretyship without written authority, a parol ratification is insufficient.

[6] Hammond *v.* Hannin, 21 Mich. 374.

[7] Kozel *v.* Dearlove, 144 Ill. 23.

[8] McCracken *v.* City of San Francisco, 16 Cal. 591; City of Findlay *v.* Pertz, 66 Fed. Rep. 427.

ful.[1] As he may authorize an act resulting in tort as well as an act resulting in contract, so he may ratify the one as well as the other.[2] The adoption of the benefits of an act made with knowledge of the material facts, carries with it the burdens of the act, whether those burdens arise from contract or from tort.

§ 42. Exceptions to rule : giving notice.

An exception to the general rule is found in the case of notice in behalf of an alleged principal where the notice is one of an existing intent, and must be authoritatively given within a specified time. Such notice cannot be given by a stranger, or by an agent in excess of authority, and be subsequently ratified after the specified time has expired, so as to avail the principal.[3] The reason is that the party notified has a right to know, not merely the facts on which the notice is based, but the existing intent of the principal with reference to such facts so far as they concern the one notified. This he is not informed of authoritatively, and it is immaterial that there is a subsequent authority. Thus, if X is indorser on a bill which has been dishonored, a notice of dishonor given him by A, who is a stranger to the bill and to the holder, will not avail the holder, and it seems is incapable of ratification by the holder.[4] In this case the holder could have authorized A to notify X, but cannot ratify the act where it was unauthorized, or at least cannot ratify it after the time allowed for notice by the law merchant has expired. So a notice to quit by two out of three joint owners will not avail as against a tenant. "The rule of law, that *omnis ratihabitio retrotrahitur*, etc., seems only applicable to cases where the conduct of the parties on whom it is to operate, not being referable to any agreement, cannot in the mean time depend on whether there be a subsequent ratifica-

[1] Hilbery *v.* Hatton, 2 H. & C. 822; Whitehead *v.* Taylor, 10 A. & E. 210.

[2] Dempsey *v.* Chambers, 154 Mass. 330.

[3] Doe *v.* Walters, 10 B. & C. 626; Doe *v.* Goldwin, 1 G. & D. 463.

[4] Stewart *v.* Kennett, 2 Camp. 177; Brower *v.* Wooten, 2 Taylor (N. C.), 70; Chanoine *v.* Fowler, 3 Wend. (N. Y.) 173.

tion."[1] Neither can there be a ratification if the rights of strangers have intervened, even though the stranger knows of the unauthorized contract.[2] "The act of ratification must take place at a time, and under circumstances, when the ratifying party might himself have lawfully done the act which he ratifies."[3]

§ 43. Exceptions to rule: void acts.

The converse of the rule is that an act which could not have been authorized cannot be ratified. It may be that the act if done by the principal or by an authorized agent would have been void; if so, a ratification would be void.[4] This generally involves the question of competency of the party, or the form of the act. Or it may be that the act if done by any one would have been illegal; if so, the ratification would be illegal, certainly if the act continues to be illegal when ratified.[5] But there may be two special cases. First, the act may be legal when done but illegal when ratified, or second, the act may be illegal when done but legal when ratified. In either case the ratification is probably inoperative. In the first case, because when the contract became illegal the offer must be regarded as revoked and a subsequent acceptance of it would be too late. In the second case, because, as the ratification relates back to the time of the unauthorized contract, it would bring into existence a contract illegal when made.[6]

§ 44. Exceptions to rule: ratification of forgery.

A special instance in the law of ratification is presented in the case of forgery. If A forges the name of B to an instrument, can B ratify the forgery? This is a vexed question on which there is no agreement. It is contended, on the one

[1] Right *v.* Cuthell, 5 East, 491.

[2] Pollock *v.* Cohen, 32 Oh. St. 514; Taylor *v.* Robinson, 14 Cal. 396; Donelly *v.* Popham, 1 Taunt. 1.

[3] Bird *v.* Brown, 4 Exch. 786.

[4] Armitage *v.* Widoe, 36 Mich. 124; Milford *v.* Water Co., 124 Pa. St. 610; Irvine *v.* Union Bank, 2 App. Cas. 366.

[5] Milford *v.* Water Co., 124 Pa. St. 610.

[6] Milford *v.* Water Co., *supra.*

hand, that so far as the rights and liabilities of B are concerned there is no more reason why he may not ratify the written contract than why he might not ratify the same contract if it rested in parol.[1] But it is contended, on the other hand, that one who commits a forgery does not assume to act as agent of the person whose name is forged; that the only conceivable motive for ratification is to conceal a crime; that the doctrine of ratification does not apply, and the person attempting to ratify is not bound.[2] While this conflict exists as to ratification, it is generally agreed that the doctrine of estoppel is applicable in cases where the attempted ratification leads innocent third persons to change their legal position, or lose or impair their legal rights.[3] There is also agreement on the proposition that no ratification or estoppel on the part of the principal can deprive the State of the right to prosecute the wrong-doer for forgery.[4]

2. *Legal Effects of Ratification.*

§ 45. Ratification is irrevocable.

Ratification bears many analogies to acceptance of an offer. Among others is the rule that when once the principal has, with knowledge of the facts, free from mistake or fraud, adopted the act of the assumed agent as his own, he cannot afterward withdraw his ratification.[5]

§ 46. Effect as between principal and third party.

Ratification relates back to the time of the contract or act ratified, and the principal and third party are in the same

[1] Greenfield Bank *v.* Crafts, 4 Allen (Mass.), 447; Hefner *v.* Vandolah, 62 Ill. 483; Howard *v.* Duncan, 3 Lans. (N. Y.) 174.

[2] Henry *v.* Heeb, 114 Ind. 275; Workman *v.* Wright, 33 Oh. St. 405; Shisler *v.* Vandike, 92 Pa. St. 447; Owsley *v.* Philips, 78 Ky. 517; Brook *v.* Hook, L. R. 6 Ex. 89; M'Kenzie *v.* British Linen Co., L. R. 6 App. Cas. 82.

[3] M'Kenzie *v.* British Linen Co., *supra;* Casco Bank *v.* Keene, 53 Me. 103; Rudd *v.* Matthews, 79 Ky. 479; Corser *v.* Paul, 41 N. H. 24.

[4] M'Kenzie *v.* British Linen Co., *supra.*

[5] Brock *v.* Jones, 16 Tex. 461; Jones *v.* Atkinson, 68 Ala. 167; Smith *v.* Cologan, 2 T. R. 188 *n.*

position as if the act has been at that time authorized.[1] The principal becomes immediately liable upon the contract, and liable as well as for any fraud committed by the agent in its formation,[2] or any tort connected with its performance.[3] If it is merely an act and not a contract which is adopted, the principal becomes liable for torts committed within the scope of the act.[4] On the other hand, the question as to whether the third person is bound by a ratification without a new assent on his part depends on the question whether the third person has a right to recede from the contract before ratification. This has already been discussed,[5] with the result that it seems justifiable to say, at least in this country, that the third party is not bound unless he has, by leaving the contract unrevoked, signified his willingness to be bound. But, of course, such assent on the part of the third person would also relate back to the time of the original contract and create obligations against him as of that date.[6]

§ 47. Effect as between principal and strangers.

While as between the parties ratification relates back to the time of the original transaction, it cannot by so doing cut off the intervening rights of strangers to the transaction. Purchasers of the subject-matter of the contract, attaching creditors, and others who acquire intervening rights in the subject-matter of the contract, are protected from the effects of a subsequent ratification.[7]

§ 48. Effect as between principal and agent.

Since ratification is equivalent to prior authority it follows that the agent after ratification is, if he has fully informed his

[1] Fleckner *v.* Bank of U. S., 8 Wheat. (U. S.) 338; Grant *v.* Beard, 50 N. H. 129.

[2] Nat. Life Ins. Co. *v.* Minch, 53 N. Y. 144; Lane *v.* Black, 21 W. Va. 617; Fairchild *v.* McMahon, 139 N. Y. 290.

[3] Nims *v.* Mount Hermon Boys' School, 160 Mass. 177.

[4] Dempsey *v.* Chambers, 154 Mass. 330.

[5] *Ante*, § 38.

[6] Wisconsin *v.* Torinus, 26 Minn. 1.

[7] *Ante*, § 42; Wood *v.* McCain, 7 Ala. 800; Taylor *v.* Robinson, 14 Cal. 396; McCracken *v.* City of San Francisco, 16 Cal. 591; Cook *v.* Tullis, 18 Wall (U. S.) 332; Bird *v.* Brown, 4 Exch. 786.

principal as to the facts, in the same position as if he had possessed prior authority to do the acts involved in the transaction.[1] He is no longer responsible unless he would have been responsible had he done the acts under express authority.[2] But the agent must, to excuse himself, not only act in good faith, but he must also be sure that he is not mistaken as to the facts communicated. A false statement, whether wilful or innocent, which induces the principal to ratify, will involve the agent in liability to his principal for loss or damage which accrues because the fact is otherwise than stated.[3] Moreover, the same conduct which might amount to ratification as between the principal and the third party will not always be so construed in favor of the agent in order to relieve him from liability for his own wrongful act.[4]

§ 49. Effect as between agent and third party.

An agent after ratification of his unauthorized act by his principal is in the same relation to the third party as if the acts had been previously authorized. The principal alone is generally liable on a contract which he has ratified,[5] though, if the third party is free to accept or reject the ratification and chooses to reject,[6] the agent would be liable on his warranty of authority.[7] But since prior authority will not relieve an agent from liability for a tort, obviously subsequent ratification will not;[8] although the agent may claim indemnity against the principal if sued for the tort in like case where he could under prior authority.[9]

[1] Spittle *v.* Lavender, 2 Brod. & Bing. 452; Risbourg *v.* Bruckner, 3 C. B. N. S. 812; Gelatt *v.* Ridge, 117 Mo. 553.

[2] Pickett *v.* Pearsons, 17 Vt. 470; Woodward *v.* Suydam, 11 Ohio, 360; Bray *v.* Gunn, 53 Ga. 144.

[3] Bank of Owensboro *v.* Western Bank, 13 Bush (Ky.), 526.

[4] Triggs *v.* Jones, 46 Minn. 277.

[5] Story on Agency, § 244.

[6] As to which see *ante*, § 38.

[7] See *post*, § 183.

[8] Josselyn *v.* McAllister, 22 Mich. 300; Richardson *v.* Kimball, 28 Me. 463; Wright *v.* Eaton, 7 Wis. 595.

[9] *Post*, § 85.

CHAPTER IV.

FORMATION OF THE RELATION BY ESTOPPEL.

§ 50. Agencies not resting on actual assent.

The agencies by agreement and by ratification rest on assent. The agent is either appointed by the principal to carry out the will of the latter, or the latter adopts the act of the agent as an expression of his own will. The agencies we have now to consider do not rest upon assent, but are created by the law on grounds of public policy or convenience, irrespective of the consent of the principal. In these agencies the prinpal has either given no authority whatever, or has not given an authority extensive enough to warrant the act done by the agent. Yet if there be ground to estop the principal from denying the authority, or if there be an unforeseen necessity urgent enough to enlarge the authority, the principal may be held liable for the agent's act. And first of estoppel.

§ 51. Meaning of estoppel.

Estoppels may arise (1) from a record, (2) from a deed, (3) from a contract, or (4) from a misrepresentation, which misrepresentation may be either by words or by conduct. Estoppels arising from contract or from misrepresentation are usually termed estoppels *in pais*, a phrase frequently used but conveying in itself no very definite notion. In the law of agency we are mainly concerned with estoppels arising from misrepresentations.

Misrepresentation may be by words or by conduct, and may be made by the person sought to be estopped acting alone or by a third person who is aided therein by the act or omission of the person sought to be estopped. For example, the defendant represents that he is a member of a firm: he is estopped to deny the truth of his representation.[1] The defendant has

[1] Sherrod *v.* Langdon, 21 Iowa, 518; Poillon *v.* Secor, 61 N. Y. 456.

been a member of a firm but withdraws from it without giving notice of his withdrawal to those who had previously been dealing with the firm: he is estopped to deny that he is a member as against those who continue to deal in the belief that he is still a member.[1] Again, a third person without defendant's knowledge or consent holds him out as a member of a firm: defendant is not estopped to deny the partnership.[2]

Estoppel is the bar which the law raises to prevent a man from proving that a fact is contrary to what he represented it to be.[3] It is based upon the idea that when one man induces another, or aids to induce another, to believe in the truth of that which appears to be true, he ought not afterward to be permitted to deny that it is true, if the other has been misled by the representation to his damage.[4] "It proceeds upon the ground that he who has been silent as to his alleged rights when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent."[5] The old notion that "estoppels are odious," based upon the technical estoppels by record or by deed, has no application to estoppels based upon misrepresentation or upon conduct equivalent to misrepresentation.[6]

The misrepresentation may be made by express statement or by conduct which the reasonable man would construe as equivalent to an express statement. The estoppel may therefore arise from contract, or from words or conduct,[7] and the words or conduct may consist in express representations or in implied representations.[8] The essence of estoppel *in pais* is that a false impression has been created by one man upon the mind of another as to the existence or non-existence of

[1] Stimson *v.* Whitney, 130 Mass. 591; Arnold *v.* Hart, 176 Ill. 442.
[2] First N. B. *v.* Cody, 93 Ga. 127; Marschall *v.* Aiken, 170 Mass. 3.
[3] Ewart on Estoppel, pp. 3–4.
[4] Pickard *v.* Sears, 6 A. & E. 469; Ewart on Estoppel, pp. 5–7.
[5] Morgan *v.* Railroad, 96 U. S. 720; Burkinshaw *v.* Nicolls, L. R. 3 App. Cas. 1004.
[6] *Ibid.*; Horn *v.* Cole, 51 N. H. 287.
[7] Bigelow on Estoppel (5th ed.), 453.
[8] *Ibid.*, 556, 570.

some fact, upon the strength of which the latter is induced to change his legal position.

Where the representation is made by express statement, it is not necessary, in order to work an estoppel, that the one making the statement should know it to be false, or should even make it recklessly, consciously ignorant of its truth or falsity.[1] He may make it in good faith, believing it to be true, and yet be estopped by it. It is enough that he may reasonably anticipate that the other party will act upon it. Where, however, the estoppel is based upon the silence or non-action of the one sought to be estopped and the misrepresentation of some third party, the estoppel will not be raised against the former unless he knows that such misrepresentation is actually being made.[2] For example, a third party represents that defendant is a partner with him: defendant is not estopped to deny this unless he has stood silent, knowing the misrepresentation to be made.[3] Again, defendant is a by-stander while an auctioneer sells goods to plaintiff which, in fact, belong to defendant: the latter is estopped to set up his title, if he knew the misrepresentation as to ownership was false, but not if he was ignorant of his own title.[4]

§ 52. Application to the law of agency.

The application of this doctrine to the law of agency is of the first importance. It may be involved, not only in the question as to the existence of the agency, but also in the question as to its nature and extent. Heretofore we have seen that a principal may be bound by the act of an agent, either because he authorized it or because he ratified it. We have now to observe that he may be bound, when he neither authorized nor ratified, upon the doctrine that he has, by his representations or conduct, led third persons to believe that the agent possessed the requisite authority, and is therefore estopped to deny it.

[1] Brookhaven *v.* Smith, 118 N. Y. 634; Stevens *v.* Ludlum, 46 Minn. 160; Ewart on Estoppel, pp. 83–97.

[2] Ewart on Estoppel, pp. 83–97.

[3] First N. B. *v.* Cody, 93 Ga. 127.

[4] Pickard *v.* Sears, 6 A. & E. 469.

(1) *Estoppel may be relied upon to establish the agency.* When one knowingly and without dissent permits another to act for him in a particular transaction, or in a general course of transactions of which the particular transaction is one, he will be estopped from denying the agency of such other as against one who in good faith, and in the exercise of reasonable prudence, has dealt with such apparent agent relying on such apparent authority.[1] To work this estoppel it is necessary that the party misled should be so misled by the representations or conduct of the alleged principal; if he is misled by the representations of the agent, the principal will not be estopped.[2] But it is not necessary that the representation should be made to the third party directly; "it is enough if it is made to another, and intended or expected to be communicated as the representations of the party making them to the party acting on them, for him to rely and act on."[3] It is, of course, necessary that there should be some representation by words or conduct, in order to create the agency by estoppel.[4] Where an agent is appointed, but his authority to do any act whatever, is contingent upon the happening of a future event, the principal cannot be estopped to deny the agency prior to the happening of the event, unless by conduct on his part he leads third persons to believe that the contingency has happened, or has been waived.[5] So if one entrust property to the custody of a dealer on condition that it shall not be sold without prior specific authorization, there is no agency whatever, and, it seems, no misrepresentation upon which to base an estoppel to deny the agency.[6]

[1] Bigelow on Estoppel (5th ed.), 565; Martin *v.* Webb, 110 U. S. 7, 15; Travellers' Ins. Co. *v.* Edwards, 122 U. S. 457, 468; James *v.* Russell, 92 N. C. 194; Simon *v.* Brown, 38 Mich. 552. See *post*, § 243.

[2] Rathbun *v.* Snow, 123 N. Y. 343.

[3] Stevens *v.* Ludlum, 46 Minn. 161.

[4] Timpson *v.* Allen, 149 N. Y. 513.

[5] *In re* Consort Deep Level Gold Mines, 1897, 1 Ch. 575; Rathbun *v.* Snow, 123 N. Y. 343.

[6] Biggs *v.* Evans, 1894, 1 Q. B. 88. But it would seem that in such a case there might be an estoppel to deny the dealer's ownership of the article sold, where it is one in which he is accustomed to deal. See

(2) *Estoppel may be relied upon to establish the extent of the agency.* While this is to be distinguished from the estoppel to deny the agency, the principle on which it is based is fundamentally the same. In the one case the defendant makes two representations, both of which are false, namely, that A is his agent, and that A as his agent has certain authority. If X relies, in good faith and in the exercise of ordinary prudence, upon these representations, he may prevent the defendant from denying either of them. In the other case the defendant makes both representations; but one of them, namely, the fact of the agency, is true, while the other, namely, the extent of the agency, is false. He is equally prevented from denying either of them; but he is prevented from denying the one because it is true, while he is prevented from denying the other because he has represented it to be true.[1] This phase of estoppel finds its expression in the general rule of law that one who deals with an agent within the *apparent* scope of his authority is protected.[2] "Where one, without objection, suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound, although no previous authority exists, in all respects as if the requisite power had been given in the most formal manner. If he has justified the belief of a third party that the person assuming to be his agent was authorized to do what was done, it is no answer for him to say that no authority had been given, or that it did not reach so far, and that the third party had acted upon a mistaken conclusion. He is estopped to take refuge in such a defence. If a loss is to be borne, the author of the error must bear it."[3]

The doctrines elsewhere set forth as to the extent of an agent's authority to bind his principal[4] are based upon the

Pickering *v.* Busk, 15 East, 38; Ewart on Estoppel, pp. 246, 484; Levi *v.* Booth, 58 Md. 305.

[1] Bickford *v.* Menier, 107 N. Y. 490.

[2] *Post*, § 102 *et seq.*

[3] Bronson's Ex'r *v.* Chappell, 12 Wall. (U. S.) 681. See also Hill *v.* Wand, 47 Kans. 340; Ewart on Estoppel, pp. 501–512.

[4] *Post*, §§ 102–106.

doctrine of estoppel so far as they include acts beyond the authority conferred. Assuming an agent to have been appointed for some purpose and authorized to do some acts, the liability of the principal for acts beyond the authority conferred may rest upon various specific considerations, but all or most of them may be reduced to the basis of estoppel. Briefly stated, the elements to be considered in fixing the principal's liability are: (1) the power actually conferred; (2) the powers reasonably necessary in the execution of those actually conferred;[1] (3) the powers annexed by custom or usage to the agency in question, considered either as to the nature of the agency, or as to the place, time, or circumstances under which it is to be exercised;[2] (4) the powers (in addition to those above named) which the principal, by his words or conduct, reasonably leads third persons to believe that his agent possesses. Now the last of these elements rests indubitably upon estoppel and can find no other doctrine in the law applicable to it.[3] But the second and third of the elements enumerated may be referred either to a doctrine of "implied authority" or to a doctrine of estoppel. It is sometimes said that it will always be implied that a principal has conferred, together with the express authority, the auxiliary authority reasonably necessary to its execution, or the authority usually incident to the particular agency.[4] It must be remembered, however, that the *fact* may be otherwise, and that it is necessary to invoke the doctrine of estoppel in order to prevent the principal from asserting the fact. Having by creating the agency represented that the agent has the authority incidental to it or affixed to it by custom, he will not afterward be heard to say that the agency was by express stipulations confined within narrower limits.

[1] "When one commands a thing to be done, he impliedly commands all [convenient] means to be used for doing this." Argument of counsel in Southerne *v.* Howe, 2 Rolle's Rep. 5, 26 (1618).

[2] Anonymous, 12 Mod. 514 (1701); Nickson *v.* Brohan, 10 Mod. 109 (1712).

[3] Johnson *v.* Hurley, 115 Mo. 513; Bradish *v.* Belknap, 41 Vt. 172. Huntley *v.* Mathias, 90 N. C. 101.

This is, of course, subject to the qualification that the third party, in dealing with the agent, does not know of the express limitation upon the incidental or customary powers. Examples of such estoppels are discussed in subsequent sections.[1]

It will be observed that the doctrine of estoppel is applicable only to cases where a representative is authorized to make promises or representations upon which third persons are invited to act, that is, it is applicable to a principal who authorizes his agent to create primary obligations, but not to a master who never authorizes his servant to create such obligations.[2]

§ 52 *a*. Application to agent's torts.

In most cases of tort, the doctrine of estoppel is inapplicable. The liability of the master for the servant's unauthorized torts rests upon other and different considerations.[3] But there is one class of torts, so-called, which properly belong under the head of principal and agent, rather than that of master and servant, and this because they arise out of agency instead of service, and the principal's liability for them rests upon grounds similar to those that fix the liability of a principal for his agent's contracts.[4]

If in conducting the agency the agent makes a representation which is either naturally incidental to, or customary in, such agencies, the principal will be estopped to deny that the agent had authority to make it as against one who reasonably relies upon it to his prejudice.[5] In ordinary cases of tort, there is no estoppel because the third party has not changed his position in consequence of any act of the agent; but in deceit and torts analogous to deceit, the third party does change his position relying upon the agent's representation,

[1] *Post*, §§ 106–116.

[2] *Ante*, §§ 4–5; *post*, § 243.

[3] *Ante*, § 5; *post*, § 242 *et seq.*

[4] Ewart on Estoppel, pp. 496–501; *post*, § 148 *et seq.*

[5] Bank of Batavia *v.* New York, &c. R., 106 N. Y. 195; Haskell *v.* Starbird, 152 Mass. 117; *contra,* British Mutual Banking Co. *v.* Charnwood Forest Ry., L. R. 18 Q. B. D. 714; Friedlander *v.* Ry., 130 U. S. 416.

and the principal is estopped to deny the agent's authority to make such representation where he has clothed his agent with the apparent authority to make it. If now the representation is false and known to the agent to be false, and the third party relies upon it to his damage, the principal should be liable just as he should be for an excess or abuse of authority in making a contract under like circumstances.

The application of this doctrine would reconcile the conflict in regard to the liability of a principal for fraudulent representations made by an agent for his own benefit, as in the case of the issue of fictitious stock by a transfer agent or of fictitious bills of lading by a shipping agent.[1] It is admitted that a bank cashier has authority to certify checks, and that therefore his certification binds the bank, although it falsely states that the drawer has funds when he has not.[2] It is admitted that a shipping clerk has authority to certify to the delivery of goods, but it is denied that his false certificate that the shipper has delivered goods when he has not will bind the carrier.[3] It is obvious that the distinction cannot rest on the nature of the instrument, for a principal is not bound upon an unauthorized negotiable instrument made by his agent, any more than upon a non-negotiable one. The primary question in each case is as to the liability of the principal for his agent's act. In each case the principal has represented that the agent had authority to do the act, that is, certify checks or issue bills of lading; in each case the agent has exceeded his actual authority by certifying a check when the drawer had no deposit, or by issuing a bill of lading when the shipper had delivered no goods; in each case the third party who takes the check or the bill of lading relies upon the representation of the principal that the agent had authority and upon the representation of the agent that the funds or the goods were in the principal's custody. In one case the principal is held estopped to deny his representation

[1] *Post*, §§ 154–157; Ewart on Estoppel, pp. 508–511.
[2] Merchants' Bank *v.* State Bank, 10 Wall. (U. S.) 604.
[3] Friedlander *v.* Texas & Pac. Ry., 130 U. S. 416.

of authority ; in the other not. The holding that the principal is estopped in both instances seems more consistent and is justified upon the well recognized grounds of estoppel.[1]

The true ground of distinction in all of these cases is that the tort is committed by an agent while acting as agent and not as servant, that is, while engaged in making contracts or representations for his principal. The confusion has arisen from an attempt to assimilate these so-called torts to ordinary torts that consist simply in the breach of an antecedent obligation. Here a voluntary primary obligation is created. A representation is made with the intent that third persons shall act upon it, and they do act upon it, thereby creating the obligation to make good the representation. The sole question is had the third persons reasonable grounds to believe that the agent was authorized to make the representation? That question should be answered upon precisely the same doctrines as if the question were whether the agent had authority to make a contract. There is as much difference between a tort by a servant in the course of his employment and this so-called tort, as between a servant's tort and an agent's contract. We are dealing with an agent and not with a servant, and in agency the principal's liability is determined by the doctrine of estoppel.[2]

§ 53. Limits of the doctrine.

The limits of the doctrine are to be sought in the general law of estoppel by misrepresentation. The rules may be briefly summarized as follows:[3] —

(1) The misrepresentation must be made by the principal, or by some one having apparent authority from him to make it, or by some one whose representation he has, by some disregard of duty, made credible.

If made by the principal in person we have the ordinary case of estoppel. If made by one having authority from him

[1] Farmers' & M. Bank *v.* Butchers' & D. Bank, 16 N. Y. 125; Bank *v.* R., 106 N. Y. 195.

[2] *Post*, §§ 148–157.

[3] Bigelow on Estoppel (5th ed.), p. 570; Ewart on Estoppel, p. 10.

to make it, we have, first, an estoppel to deny the agent's authority, and, second, an estoppel to deny the agent's misrepresentation. If made by one (not an agent) whose representation he has made credible, we have the case of a misrepresentation by a third party, aided by some act or omission by the defendant under circumstances where he owed a duty to use due care to avoid harm or loss to others.[1]

(2) The representation must be as to a material fact, or of such a character as may reasonably influence the conduct of another person.

(3) The representation must be made with the intent that the other party shall act upon it, or in a manner calculated to lead him to act upon it.

(4) The other party must be ignorant of the truth, and his ignorance must not be the result of his own negligence or bad faith.

(5) The other party must actually be induced to act relying on the representation.

Any further discussion of the elements of estoppel would be foreign to the purpose of this work. The application of the doctrines will appear in subsequent chapters.[2]

[1] Ewart on Estoppel, pp. 18–27, 28–67.

[2] *Post*, §§ 102–116; §§ 149–157.

CHAPTER V.

FORMATION OF THE RELATION BY NECESSITY.

§ 54. General doctrine of contracts from necessity.

Aside from contracts which rest upon the agreement of the parties there is a more or less clearly defined class of legal relations in which obligations are enforced by contractual remedies although in fact no contract by agreement existed between the parties. These are called "contracts created by law," or "quasi-contracts." [1] Such is the obligation of an infant to pay for necessaries,[2] of a man to return money received under mistake,[3] of a corporation to return the benefits received under a contract *ultra vires*,[4] or of a man to pay for benefits conferred under statutory authority.[5] The obligation where not a statutory one is created by the courts on grounds of public policy to do justice between the parties.

The principle of quasi-contractual obligation is applied for the purpose of creating an agency where otherwise there would be none. Such agency generally arises from the necessity of the particular situation.

§ 55. Agency of wife.

The authority of a wife to pledge her husband's credit may rest upon any one of three grounds, namely, actual authority, ostensible authority, or necessity.

If there be actual authority there is simply the usual agency by agreement heretofore discussed.

Ostensible authority in the case of a wife may arise from the fact of cohabitation. Where a husband and wife live

[1] Keener on Quasi-Contracts, Chap. I.
[2] Trainer *v.* Trumbull, 141 Mass. 527.
[3] Keener, Chap. II.
[4] Central Trans. Co. *v.* Pullman Car Co., 139 U. S. 24.
[5] Steamship Co. *v.* Joliffe, 2 Wall. (U. S.) 450.

together, there is a presumption that she is authorized to pledge his credit for the ordinary and usual household purchases.[1] But for purchases going beyond such as the manager of a household might reasonably make, there is no presumption of authority from the fact of the conjugal relation alone; authority, if any, must be sought in acts and conduct on the part of the husband calculated to induce third persons to believe that the wife has the added authority, such, for example, as having without objection previously recognized and paid for such purchases.[2] In other words, ostensible authority rests upon the same considerations here as in any other case, except that the fact that the wife manages the household raises a presumption of authority to make the usual and ordinary purchases for it. Where they live apart no such presumption arises.[3]

Authority by necessity is an authority created by the law as a result of the marital relation by virtue of which the wife has power to pledge the husbands' credit in order to obtain the necessaries which he has neglected or refused to furnish.[4] This may exist even where the husband has forbidden the wife to pledge his credit, or has notified third persons not to supply her upon his credit,[5] or where, with his consent or in consequence of his fault, she is living apart from him.[6] There may be two theories on which this result is reached, — (1) that the obligation of the husband is to pay for the necessaries without regard to the question of agency,[7] or (2) that there is a compulsory agency created by law under which the wife's act is the husband's act.[8] The first

[1] Harrison *v.* Grady, 13 L. T. Rep. 369; Flynn *v.* Messenger, 28 Minn. 208.

[2] Bergh *v.* Warner, 47 Minn. 250.

[3] Vusler *v.* Cox, 53 N. J. L. 516; Johnston *v.* Sumner, 3 Hurl. & Nor. 261.

[4] Bergh *v.* Warner, 47 Minn. 250. [5] *Ibid.*

[6] Johnston *v.* Sumner, 3 Hurl. & Nor. 261; Wilson *v.* Ford, L. R. 3 Ex. 63.

[7] Keener on Quasi-Contracts, pp. 22, 23.

[8] Benjamin *v.* Dockham, 134 Mass. 418; Johnston *v.* Sumner, 3 Hurl. & Nor. 261.

theory finds color in the fact that the husband must pay even if the wife be insane or unconscious, or even if the husband be insane.[1] In any case the creditor must show that the husband neglected or refused to provide suitable support, and that the articles furnished were necessaries. What are necessaries is a question of fact for the jury, except where the court can positively declare that the articles are not necessaries.[2]

§ 56. Agency of infant child in purchase of necessaries.

Some of the American courts enforce the doctrine that a father is liable for necessaries furnished his infant child where no actual authority is vested in the child to pledge the father's credit. It is probably true that slighter evidence will establish authority in such cases, than in cases where the relation does not exist.[3] But in some cases no evidence of such authority exists at all, and hence the agency cannot rest on assent. The English and some of the American courts refuse to enforce any obligation under such circumstances,[4] but some of our courts enforce it on the same theory as in the case of the compulsory agency of the wife.[5]

§ 57. Agency of shipmaster.

A shipmaster has authority in cases of necessity to purchase supplies for the vessel and pledge the credit of the owner.[6] This is analogous to the purchase of necessaries by a wife or

[1] Read *v.* Legard, 6 Ex. 636; Cunningham *v.* Reardon, 98 Mass. 538, cited by Keener on Quasi-Contracts, p. 22.

[2] Davis *v.* Caldwell, 12 Cush. (Mass.) 512.

[3] Clark *v.* Clark, 46 Conn. 586; Fowlkes *v.* Baker, 29 Texas, 135. And see Schouler on Domestic Relations, § 241; Jordan *v.* Wright, 45 Ark. 237; Freeman *v.* Robinson, 38 N. J. L. 383.

[4] Mortimore *v.* Wright, 6 M. & W. 482; Shelton *v.* Springett, 11 C. B. 452; Kelley *v.* Davis, 49 N. H. 187; Gordon *v.* Potter, 17 Vt. 348; Freeman *v.* Robinson, 38 N. J. L. 383; Carney *v.* Barrett, 4 Ore. 171.

[5] Gilley *v.* Gilley, 79 Me. 292; Cromwell *v.* Benjamin, 41 Barb. (N. Y.) 558; Manning *v.* Wells, 8 Misc. (N. Y.) 646; Watkins *v.* De-Armond, 89 Ind. 553. And see *dictum* in Dennis *v.* Clark, 2 Cush. (Mass.) 347, 352.

[6] McCready *v.* Thorn, 51 N. Y. 454.

child, in that the plaintiff in order to recover must show that the supplies were in fact necessaries. Such authority may, indeed, be thought to be conferred by the contract or assent of the owner aided by custom, but it is closely analogous to the compulsory agencies arising from necessity. So also the shipmaster has authority to sell the cargo or even the vessel itself in case of supreme necessity.[1]

§ 58. Agency of unpaid vendor.

An unpaid vendor who is still in possession of the goods, may re-sell the same as agent of the vendee and charge the vendee with the difference between the contract price and the amount received on the re-sale. This agency arises "by operation of law," and can be defeated by the vendee only by taking and paying for the goods.[2]

§ 59. Other illustrations.

The doctrine of agency by necessity has been extended in some modern cases to relations unknown to the common law. The most important instance is that of the employment of medical attendance in railway accidents. Is a railway company liable for services rendered by a physician in the care of injured servants or passengers, where the services are rendered at the request of (say) a conductor? It is held on the one side that it is, on the ground that the emergency creates an agency by necessity in favor of the highest railway official on the scene of the accident or within reach by reasonable means of communication.[3] But this conclusion is denied in other jurisdictions.[4] The grade of the officer may determine

[1] Pike *v.* Balch, 38 Me. 302; Gaither *v.* Myrick, 9 Md. 118; Butler *v.* Murray, 30 N. Y. 88; *post*, § 116.

[2] Dustan *v.* McAndrew, 44 N. Y. 72; Benjamin on Sales (6th ed.), §§ 782–795, and American note.

[3] Terre Haute, &c. R. *v.* McMurray, 98 Ind. 358; Ib. *v.* Stockwell, 118 Ind. 98; Toledo, &c. R. *v.* Mylott, 6 Ind. App. 438; Indianapolis, &c. R. *v.* Morris, 67 Ill. 295.

[4] Sevier *v.* Birmingham, &c. R., 92 Ala. 258; Peninsular R. *v.* Gary, 22 Fla. 356; Tucker *v* St. Louis, &c. Ry., 54 Mo. 177. See Marquette, &c. R. *v.* Taft, 28 Mich. 289, where the court was evenly divided. And see Godshaw *v.* Struck, (Ky.) 58 S. W. 781; Central of Georgia R. *v.* Price, 106 Ga. 176.

the question, but if so, it must be on the ground of assent and not of necessity.[1]

The recent English case of Gwilliam *v.* Twist [2] is an interesting one upon the question of a servant's acquiring authority by necessity. The driver of an omnibus belonging to defendants became intoxicated while on duty and was taken from his seat by a policeman. A man who happened to be standing near, volunteered to drive the omnibus to the defendants' yard, and the driver and conductor acquiesced, the former warning him to drive carefully. The volunteer in negligently turning a corner ran over and injured plaintiff, who brought action for damages against the defendants, owners of the omnibus. The trial court held, with considerable hesitation, that the defendants were liable for the injury, placing its decision upon the ground of agency by necessity; but the Court of Appeal reversed the decision on the ground that the necessity did not sufficiently appear, since the defendants might have been communicated with, and left open the question whether, if there had been an actual necessity, the defendants would have been liable.[3]

[1] Langan *v.* Great W. Ry., 30 L. T. N. S. 173; Swazey *v.* Union Mfg. Co., 42 Conn. 556.

[2] 1895, 1 Q. B. 557; on appeal, 1895, 2 Q. B. 84.

[3] See also Sloan *v.* Central Iowa Ry. Co., 62 Iowa, 728; Fox *v.* Chicago, &c. Ry. Co., 86 Iowa, 368. See *post*, §§ 239–240.

CHAPTER VI.

TERMINATION OF THE RELATION.

§ 60. Ways in which relation may be terminated.

The relation of principal and agent may be terminated, by various methods, and for convenience of treatment, these methods may be classified as follows: (1) by bilateral act; (2) by unilateral act; (3) by operation of law. But to the general rules governing the termination of the agency by these means there is an important exception, (4) where the agency is coupled with an interest or where its revocation would involve the agent in liability toward third persons.

1. *By Bilateral Act.*

§ 61. By terms of original agreement.

The relation may be limited by the terms of the original agreement, in any one of the following ways: (1) When the contract by its terms is to endure only during a certain period of time, the expiration of that period will dissolve the relation.[1] (2) When the parties manifestly contemplate that the relation shall continue only until the happening of a certain event, the happening of that event likewise operates as a dissolution.[2] (3) When the purpose for which the agency was created is accomplished, either through the instrumentality of the agent or otherwise, the agent's authority is terminated.[3]

In every case, it is a question of the intention of the parties, and such intention, unless expressed by the words of the contract, may be implied from the circumstances of the case.

[1] Gundlach *v.* Fischer, 59 Ill. 172.

[2] Danby *v.* Coutts, L. R. 29 Ch. Div. 500.

[3] Moore *v.* Stone, 40 Iowa, 259; Short *v.* Millard, 68 Ill. 292; Ahern *v.* Baker, 34 Minn. 98.

Thus the authority of an attorney engaged to conduct an action terminates when judgment is rendered.[1] An auctioneer's authority ceases when the sale is consummated.[2] And a broker's ceases when the contract of sale is completed.[3]

§ 62. By subsequent agreement.

Agency depends for its existence upon the contract by which it was created, and consequently a subsequent agreement between the parties to cancel or rescind their original contract, terminates the relation. The rescinding contract, of course, must have the essential element of consideration, but the abandonment by either party of his rights under the original contract is sufficient.[4]

2. *By Unilateral Act.*

§ 63. Revocation and renunciation.

Having considered the ways in which the agency may be terminated by the voluntary act of both principal and agent, we have now to treat of its termination by the act of one party alone. This may be effected, (1) by the principal's revocation of his agent's authority; (2) by the agent's renunciation of his authority. Questions as to remedies for breach of contract by either principal or agent are considered hereafter.[5]

§ 64. Revocation — when possible.

It is clear upon principle, that since the authority is conferred by the principal, and is to be exercised on his behalf and for his benefit, the agent should not be permitted to continue in the exercise of such authority any longer than the principal desires. The relation is, in a degree, personal and confidential, and the principal for his own protection should be able to withdraw his confidence at will. It is therefore the general rule of law, subject to the exceptions hereafter enu-

[1] MacBeath *v.* Ellis, 4 Bing. 578; Butler *v.* Knight, L. R. 2 Ex. 109.
[2] Seton *v.* Slade, 7 Ves. 265.
[3] Blackburn *v.* Scholes, 2 Camp. 341.
[4] Huffcut's Anson on Cont. p. 333 *et seq.*
[5] *Post,* §§ 79–81.

merated,[1] that the principal may revoke his agent's authority at any time before the authority has been fully exercised, and with or without good cause.[2] And this is true even where the principal has expressly or impliedly agreed not to revoke. In such a case, however, the principal, although he has the *power*, has not the *right* to revoke, and the agent has an action against the principal for any damages suffered by him as a result of the revocation.[3]

§ 65. Revocation — what amounts to.

The revocation of the agent's authority may be by the express act of the principal, or it may be implied from the circumstances of the case. In the absence of statute, a sealed or written revocation is unnecessary, even though the authority was originally conferred by a formal instrument.[4] The circumstances from which a revocation will be implied are various. If the principal, after conferring the authority, but prior to its execution, disposes of the subject-matter of the agency, or involuntarily loses control over it, a revocation must necessarily be implied.[5] For example, if a principal confers authority upon an agent to sell his house, and before the agent accomplishes his object, the house is destroyed by fire or sold by the principal himself, the agent is clearly deprived of his power, and a revocation of authority is therefore presumed. And so also, if after conferring authority upon an agent to perform a specified act, necessarily exclusive, the principal gives the same power to another, the authority of the first agent is thereby revoked.[6] But it is held that the authority of an agent to do a specified act is not necessarily

[1] *Post*, § 72.

[2] Hartley's Appeal, 53 Pa. St. 212; Blackstone *v.* Buttermore, 53 Pa. St. 266; Chambers *v.* Seay, 73 Ala. 372; Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 174; Venning *v.* Bray, 2 B. & S. 502; Warwick *v.* Slade, 3 Camp. 127.

[3] Chambers *v.* Seay, *supra;* Blackstone *v.* Buttermore, *supra;* MacGregor *v.* Gardner, 14 Iowa, 326.

[4] The Margaret Mitchell, Swabey, 382; Brookshire *v.* Brookshire, 8 Iredell (N. C.) Law, 74.

[5] Gilbert *v.* Holmes, 64 Ill. 548.

[6] Copeland *v.* Mercantile Ins. Co., 6 Pick. (Mass.) 198.

revoked by the subsequent employment of another to attend to all business of the principal.[1] The dissolution of a corporation or partnership, or the severance of the interests of joint principals, revokes the authority of agents.[2]

§ 66. **Revocation, notice of.**

A revocation is effectual and binding, only as against those who have notice that it has been made. Consequently, in order to protect himself, the principal must communicate the revocation not only to the agent,[3] but to all persons who, upon the strength of his previous authority, are likely to deal with him.[4] In case the authority is only for the performance of a special act, however, third persons cannot presume that the agency will continue after the performance of that act, and therefore no notice of revocation need be communicated to them.[5] Nor is it necessary to give notice to a sub-agent, deriving his authority from the agent alone.

The method by which the revocation should be communicated varies with each particular case, but the notice must always be sufficient to make the knowledge of the revocation co-extensive with the knowledge of the authority. Thus, to persons who have never dealt with the agent, a general notice through the medium of the public press is sufficient, whether it is seen or not. But to persons who have transacted business with the agent, actual notice must be given, or at least such knowledge of the revocation must be communicated to them as would serve to place a prudent man upon inquiry.[6] A

[1] Smith *v.* Lane, 101 Ind. 449.

[2] Schlater *v.* Winpenny, 75 Pa. St. 321; Rowe *v.* Rand, 111 Ind. 206; Griggs *v.* Swift, 82 Ga. 392.

[3] See Robertson *v.* Cloud, 47 Miss. 208. It seems that a notice left at the agent's usual place of business is enough to terminate the agency, even before the agent has actual notice of it. Rees *v.* Pellow, 97 Fed. Rep. 167. Compare Shuey *v.* United States, 92 U. S. 73.

[4] Tier *v.* Lampson, 35 Vt. 179; Fellows *v.* Hartford, &c. Co., 38 Conn. 197; Lamothe *v.* St. Louis, &c. Co., 17 Mo. 204; McNeilly *v.* Continental Life Ins. Co., 66 N. Y. 23.

[5] Watts *v.* Kavanagh, 35 Vt. 34.

[6] Claflin *v.* Lenheim, 66 N. Y. 301, 305.

failure to protect third persons by due notice may give rise to an agency by estoppel.[1]

§ 67. Revocation, effect of, as to principal and agent.

It appears, therefore, that unless the agent's authority is coupled with an interest, the principal has the *power* to revoke it at any time, and with or without good cause. It does not always follow, however, that he has the *right* to revoke without incurring liability for breach of contract. Where there is an agreement, express or implied, that the relation shall endure for a definite time, the principal cannot revoke without subjecting himself to liability for the damages resulting to the agent.[2] Of course, this rule does not apply in case the agent has broken an express or implied condition in the original contract. For instance, every contract of agency contains the implied condition that the agent will faithfully, honestly, and diligently perform his duty, and if he fails so to do, the principal may revoke his authority without liability.[3] Unless guilty of gross and wilful misconduct, the agent is entitled, upon revocation, to reasonable remuneration for his past services and expenditures, and, if nothing further remains to be done, to full remuneration.[4]

§ 68. Revocation, effect of, as to third persons.

It has already been seen that the revocation of an agent's authority is effectual as to all persons who have notice that it has been made, the character of the notice depending upon circumstances. If sufficient notice has not been given, and the third person has no knowledge of the revocation, he may presume that the agency still exists, and his subsequent dealings with the agent are binding and enforceable against the principal.[5] In such case the principal is estopped to deny the agency.

[1] *Ante*, § 50 *et seq.*

[2] Lewis *v.* Atlas, &c. Ins. Co., 61 Mo. 534; Standard Oil Co. *v.* Gilbert, 84 Ga. 714.

[3] Dieringer *v.* Meyer, 42 Wis. 311; *post*, § 87.

[4] Sumner *v.* Reicheniker, 9 Kansas, 320; *post*, § 79.

[5] Anon. *v* Harrison, 12 Mod. 346; Trueman *v.* Loder, 11 A. & E. 589; Claflin *v.* Lenheim, 66 N. Y. 301; Fellows *v.* Hartford, &c. Co., 38

§ 69. Renunciation.

The agent, like the principal, may terminate the relation at will. And so also, his renunciation, if not express, may be implied from the circumstances. Thus, if the agent abandons his work, the principal is justified in regarding his authority as renounced.[1]

The renunciation becomes operative, as between principal and agent, when knowledge of it actually reaches the principal. And the principal, as in the case of his own revocation, must notify third persons in order to protect himself from liability for the subsequent fraudulent dealings of the agent.[2]

If the agency is to endure for an indefinite period, or is an agency at will, the agent has not only the *power* but the *right* to renounce at any time.[3] But in case there is an express or implied agreement that the agency is to endure for a definite period, a renunciation is a breach of contract and subjects the agent to liability for the damages resulting to the principal.[4] There is an exception to this rule, of course, when the principal, by his own breach, justifies the renunciation. If an agent renounces the employment he cannot generally recover compensation for services rendered, but some jurisdictions allow a recovery on *quantum meruit*.[4]

3. *By Operation of Law.*

§ 70. Change affecting subject-matter.

Contracts may be discharged without the consent of the parties, or irrespective of their consent. Such are the cases where the law creates a discharge on grounds of public policy, convenience, or necessity. Discharge by operation of law is a topic of the general law of contract, and need not be specially treated here.[5] So far as contracts of personal service

Conn. 197; Tier *v.* Lampson, 35 Vt. 179; Lamothe *v.* St. Louis, &c. Co., 17 Mo. 204.

[1] Stoddart *v.* Key, 62 How. Pr. (N. Y.) 137.

[2] Capen *v.* Pac. &c. Ins. Co., 1 Dutcher (N. J. L.), 67.

[3] Barrows *v.* Cushway, 37 Mich. 481.

[4] *Post*, § 81.

[5] Huffcut's Anson on Cont. pp. 390–399; Leake on Cont. (3d ed.) 590 *et seq.*

are concerned the subject involves, (1) a change in the law itself, (2) a change affecting the subject-matter or circumstances of the contract, (3) a change affecting the parties to the contract. These changes are generally in the nature of what is termed a subsequent impossibility.

(1) A change in the law itself which renders the continuance of the contract impossible, because illegal, would operate to discharge the contract.[1]

(2) A change affecting the subject-matter or circumstances of the contract may operate to discharge the contract if the contract was made in contemplation of the continued existence of the subject-matter or circumstances as it or they were at the time of the formation of the contract. Thus if the agency be created for the sale of a specific article and the article should perish, without fault, the agency would be terminated.[2] So if the agency contemplated the continued existence of a particular state of things, and, without fault, this condition should cease to exist, the agency would be terminated.[3] But "the parties must have contemplated the continuing of that state of things as the foundation of what was to be done;" otherwise a change in conditions, however seriously it may interrupt the agency, will not discharge the contract.[4] Whether the danger arising from the prevalence of a contagious disease at the place where the service is to be rendered will discharge the contract, is a disputed question.[5]

(3) A change affecting the parties to the contract may be caused by death, insanity, illness, marriage, constraint of law, bankruptcy, and war. These are treated in the succeeding section.

[1] Cordes *v.* Miller, 39 Mich. 581.

[2] Dexter *v.* Norton, 47 N. Y. 62.

[3] Stewart *v.* Stone, 127 N. Y. 500.

[4] Turner *v.* Goldsmith, 1891, 1 Q. B. 544, where the destruction of the principal's manufactory was held not to discharge an agency for the sale of the goods manufactured; so also Madden *v.* Jacobs, 52 La. Ann. 2107.

[5] Lakeman *v.* Pollard, 43 Me. 463; Dewey *v.* Union School Dist., 43 Mich. 480.

§ 71. Change in condition of parties.

(1) *Death.* The death of either party to the contract terminates the agency. It is no longer binding on the survivor nor on the estate of the deceased.[1] The death of the principal revokes the authority of the agent, and any contracts made with him afterwards are a nullity, even though no notice of the revocation of authority is given.[2] The death of one of two joint principals has the like effect.[3] But if the agent's authority be coupled with an interest, the death of the principal does not revoke the authority.[4] So also, the death of the agent terminates his authority, and it cannot be exercised by his administrator.[5]

(2) *Insanity.* The after-occurring insanity of the principal or agent, like his death, terminates the agency.[6] And if his insanity has been judicially declared, the decree of the court will be regarded as notice, and the revocation will operate upon all persons, whether or not they have actual knowledge of the insanity. But if the principal has not been formally adjudged insane, persons who, in ignorance of the insanity, deal with the agent, are protected. This, upon the theory that while both principal and third person are innocent and free from blame, the principal, by conferring the original authority, had made the wrong possible, and he must therefore bear the loss.[7] In accordance with the general rule, if

[1] Lacy *v.* Getman, 119 N. Y. 109.

[2] Farmers', &c. Co. *v.* Wilson, 139 N. Y. 284; Long *v.* Thayer, 150 U. S. 520; *In re* Succession of Lanaux, 46 La. Ann. 1036; Harper *v.* Little, 2 Me. 14; Blades *v.* Free, 9 B. & C. 167. *Post*, § 200.

[3] McNaughton *v.* Moore, 1 Haywood (N. C.), 189; Rowe *v.* Rand, 111 Ind. 206; Tasker *v.* Shepherd, 6 H. & N. 575.

[4] Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 174, 203; Grapel *v.* Hodges, 112 N. Y. 419; *post*, § 72.

[5] Johnson *v.* Johnson's Adm'r, Wright (Ohio), 594.

[6] Davis *v.* Lane, 10 N. H. 156; Motley *v.* Head, 43 Vt. 633; Matthiesen, &c. Co. *v* McMahon, 38 N. J. L. 536; Drew *v.* Nunn, L. R. 4 Q. B. D. 661.

[7] *Ante*, § 16. But the burden is upon the third party to show that he was ignorant of the principal's insanity. Merritt *v.* Merritt, 43 N. Y. App. Div. 68.

the agent's authority is coupled with an interest, the principal's insanity does not terminate the agency.[1]

(3) *Illness.* The illness of the principal would have no effect upon the agency. But the illness of the agent which incapacitated him from performing the duties of the agency would warrant him in renouncing the contract.[2] And it is immaterial that his illness is due to his own fault, since an inquiry as to the cause of the illness is treated as an inquiry into a remote cause.[3] If, however, before renunciation or notice of the termination of the agency, the agent should act for the principal, his acts would, of course, be binding.

(4) *Marriage.* The marriage of a principal does not, as a general rule, operate as a termination of the agency. It may, however, revoke an authority the exercise of which would impair rights growing out of the marriage. For instance it is held that a power of attorney to sell land, the home of a single man, is revoked by his marriage.[4] The principal's wife, by the marriage, acquires an interest in the land which can only be divested by her joining in the conveyance, or in the power to convey. Under the common law, a woman was deprived by marriage of all control over her property, and the authority of her agent was consequently revoked.[5] But under the modern statutes giving to married women the right to hold and control separate property, this rule, of course, does not apply. The marriage of a woman who is under contract of service does not of itself afford ground for a revocation of the contract by the master.[6] And, as we have seen, married women may act as agents.[7]

(5) *Constraint of Law.* Where the law puts a constraint on one of the parties which renders it impossible for him to continue the relation, the agency is revoked. Thus the arrest

[1] *Post*, § 72.

[2] Spalding *v.* Rosa, 71 N. Y. 40; Robinson *v.* Davison, L. R. 6 Ex. 269.

[3] Hughes *v.* Wamsutta Mills, 11 Allen (Mass.), 201 (*semble*).

[4] Henderson *v.* Ford, 46 Texas, 627.

[5] Wambole *v.* Foote, 2 Dak. 1.

[6] Edgecombe *v.* Buckhout, 146 N. Y. 332.

[7] *Ante*, § 23.

and imprisonment of an agent terminates the agency, and it is immaterial that the arrest is due to the fault of the offender.[1] So if a corporation be dissolved by judicial proceedings, the agency is revoked.[2] The dissolution of a partnership, whether voluntary or involuntary, terminates an agency in which the firm was either principal or agent.[3]

(6) *Bankruptcy.* The mere insolvency of the principal has no effect upon the agency, but if the principal becomes legally bankrupt, and voluntarily or involuntarily surrenders the control of his property and affairs, the authority of the agent, unless coupled with an interest, is regarded as terminated.[4] It seems, however, that even after bankruptcy, the agent may act for his principal in regard to all matters except those touching the rights and property of which he is divested by the bankruptcy.[5] And it is also held that although the adjudication of the court relates back to the act of bankruptcy, persons who, subsequent to the act of bankruptcy but prior to the adjudication, deal with the agent in good faith, will be protected.[6] The bankruptcy of the agent revokes his authority to deal with the principal's property rights, although he might still perform a purely formal act.[7]

(7) *War.* Although there are several cases to the contrary, it seems to be the law in America, that the existence of war between the country or State of a principal, and that of his agent, terminates the agency. This is in accord with the general rule that all trading or commercial intercourse between two countries at war is prohibited.[8] The exception is

[1] Hughes *v.* Wamsutta Mills, 11 Allen (Mass.), 201; Leopold *v.* Salkey, 89 Ill. 412.

[2] People *v.* Globe Ins. Co., 91 N. Y. 174.

[3] Griggs *v.* Swift, 82 Ga. 392.

[4] Story on Agency, § 482; Minett *v.* Forrester, 4 Taunt. 541; Pearson *v.* Graham, 6 A. & E. 899; Parker *v.* Smith, 16 East, 382; *Ex parte* Snowball, L. R. 7 Ch. App. 548.

[5] Dixon *v.* Ewart, Buck, 94; 3 Mer. 322.

[6] *Ex parte* Snowball, L. R. 7 Ch. App. 548; Elliott *v.* Turquand, L. R. 7 App. Cases, 79.

[7] Audenried *v.* Betteley, 8 Allen (Mass.), 302. As to the agent's right to compensation after bankruptcy, see *post*, § 80.

[8] Kershaw *v.* Kelsey, 100 Mass. 561; United States *v.* Grossmayer, 9 Wall. (U. S.) 72. See *ante*, § 22.

recognized, however, that debts may be paid to the agent of an alien enemy, when such agent resides in the same State with the debtor. But it must be with the mutual assent of principal and agent, and it must not be done with the view of transmitting the funds to the principal during the continuance of the war.[1]

4. *Irrevocable Agencies.*

§ 72. Doctrine of irrevocable agencies.

To the general rule that an authority vested in an agent may be revoked by the principal, and that it is revoked by the death, lunacy, or bankruptcy of the principal, there are some exceptions, and these exceptions constitute what are known as irrevocable agencies. The reason for holding certain powers vested in an agent irrevocable, is that a revocation would cause to the agent a loss or damage other than, and different from, a mere loss of employment or profit. Thus if, for a valuable consideration, an authority is vested in an agent for the purpose of fortifying a security held by him against the principal, or of protecting or securing an interest of his, the authority is irrevocable because its revocation would subject the agent to damage by the loss of such security, or the means of realizing upon it.[2] So also if the agent is employed to do an act which involves him in personal liability to a third person, and he has incurred such liability, the power cannot be revoked, because its revocation would subject the agent to an action by the third person.[3] In the first case the agent is said to have "a power coupled with an interest." In the second case he may be said to have "a power coupled with an obligation." There are, then, two exceptions to the general rule that an agency is revocable,

[1] Insurance Co. *v.* Davis, 95 U. S. 425; N. Y. Life Ins. Co. *v.* Statham, 93 U. S. 24; Ward *v.* Smith, 7 Wall. (U. S.) 447; Howell *v.* Gordon, 40 Ga. 302. See *ante*, § 21.

[2] Walsh *v.* Whitcomb, 2 Esp. 565; Gaussen *v.* Morton, 10 B. & C. 731; Raleigh *v.* Atkinson, 6 M. & W. 670; Smart *v.* Sandars, 5 C. B. 895; Dickinson *v.* Bank, 129 Mass. 279; Carter *v.* Slocomb, 122 N. C. 475.

[3] Read *v.* Anderson, 13 Q. B. D. 779; Thacker *v.* Hardy, 4 Q. B. D. 685; Crowfoot *v.* Gurney, 9 Bing. 372; Hess *v.* Rau, 95 N. Y. 359.

namely, (1) where the agent has "a power coupled with an interest," and (2) when the agent has "a power coupled with an obligation."

(1) A "power coupled with an interest" is difficult to define accurately. The word "interest" must not be taken in a broad but in a narrow sense. It means an interest in the thing itself which constitutes the subject-matter of the agency as distinguished from an interest in the execution of the power. "In other words, the power must be engrafted on an estate in the thing."[1] There must be first an interest or title in the thing constituting the subject-matter of the agency and then, coupled with this, a power to dispose of or otherwise control the thing for the purpose of protecting the interest. Thus, if a factor makes advances to his principal in consideration of authority to sell goods consigned to him and reimburse himself for the advances, the authority is irrevocable; but if he is authorized to sell the goods and pay himself from the proceeds a sum not advanced in consideration of the power, the authority is revocable.[2] If one have an interest in lands or goods, coupled with a power of sale, the power is irrevocable.[3] But if one be authorized to sell lands or goods in which he has no interest and apply the proceeds to a debt due the agent from the principal, the power is revocable because the agent, while having an interest in the execution of the power, has none in the subject-matter of the agency.[4]

The American rule seems to be that an interest in the subject-matter of the agency by way of security or indemnity, coupled with a power to sell or otherwise dispose of the property, renders the power irrevocable;[5] but an interest by

[1] Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 174.

[2] Raleigh *v.* Atkinson, 6 M. & W. 670; Smart *v.* Sandars, 5 C. B. 895; Taplin *v.* Florence, 10 C. B. 744.

[3] Roland *v.* Coleman, 76 Ga. 652; Knapp *v.* Alvord, 10 Paige (N. Y.), 205.

[4] Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 174; Frink *v.* Roe, 70 Cal. 296; Farmers', &c. Co. *v.* Wilson, 139 N. Y. 284.

[5] Knapp *v.* Alvord, 10 Paige (N. Y.), 205.

way of compensation in the proceeds of such sale is not such an interest as will render the power irrevocable.[1]

The English rule is somewhat broader and is to the effect that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority (as in the proceeds by way of payment of a debt), such an authority is irrevocable.[2] This rule does not positively require that the agent should have an "interest in the subject-matter," in the sense in which that term is employed in most of the American cases, but is satisfied if the agent has an interest in the execution of the power, provided such interest rests upon a sufficient consideration.

A leading American case took a distinction between revocation by the voluntary act of the principal, and revocation by death, and, while arguing that where the agent had acquired upon consideration an interest in the execution of the power, the principal could not have revoked such power during his life, held that the power was revoked by the principal's death.[3] It is believed, however, that such a distinction is not generally recognized, and that where a power is irrevocable by the voluntary act of the principal, it is not revoked by his bankruptcy,[4] insanity, or death.[5]

(2) A power coupled with an obligation means a power in the execution of which an agent has come under some obligation to a third person. Where the revocation would involve the agent in liability to a third person, the principal cannot revoke, nor will the law revoke, the agency. Thus if an agent is authorized to make a contract for the principal and

[1] Blackstone *v.* Buttermore, 53 Pa. St. 266; Chambers *v.* Seay, 73 Ala. 372; Stier *v.* Ins. Co., 58 Fed. Rep. 843.

[2] Gaussen *v.* Morton, 10 B. & C. 731; Clerk *v.* Laurie, 2 H. & N. 199; *In re* Hannan's, &c. Co., 1896, 2 Ch. 643, affirming 74 L. T. Rep. N. S. 550.

[3] Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 174. See also Watson *v.* King, 4 Camp. 272.

[4] Dickinson *v.* Bank, 129 Mass. 279; Renshaw *v.* Creditors, 40 La. Ann. 37.

[5] Knapp *v.* Alvord, 10 Paige (N. Y.), 205; Hess *v.* Rau, 95 N. Y. 359; Carter *v.* Slocomb, 122 N. C. 475.

the agent has so far involved himself in the execution of the power as that he would suffer loss or damage if the affair were not carried through, the power to consummate it is irrevocable.[1] So also if the agent is authorized to pay money on behalf of the principal to a third person, and has come under a personal liability to such third person for the sum in question, the principal cannot revoke the authority.[2] These cases are sometimes treated as if they were those of a "power coupled with an interest,"[3] but they are distinguishable from that class of cases which really have a more definitely limited scope.[4]

[1] Huffcut's Anson on Cont. pp. 431–432; Read *v.* Anderson, 10 Q. B. D. 100; Hess *v.* Rau, 95 N. Y. 359.

[2] Crowfoot *v.* Gurney, 9 Bing. 372; Goodwin *v.* Bowden, 54 Me. 424. See also Kindig *v.* March, 15 Ind. 248. *Post*, § 205.

[3] Hess *v.* Rau, *supra.*

[4] Huffcut's Anson on Cont. p. 432.

PART II.

LEGAL EFFECT OF THE RELATION AS BETWEEN PRINCIPAL AND AGENT.

§ 73. Introduction.

It being assumed that the relation of principal and agent has been formed, we pass to a consideration of the legal consequences of the relation as concerns the principal and agent. The relation when founded on contract imposes mutual obligations. Even when gratuitous the agency if acted upon calls for care and prudence on the part of the agent. We proceed therefore to inquire: (1) What are the obligations of a principal toward his agent; and (2) What are the obligations of an agent toward his principal?

CHAPTER VII.

OBLIGATIONS OF PRINCIPAL TO AGENT.

§ 74. Source and nature of obligations.

The obligations of each party are fixed either by the terms of the contract agreed to by them, or by the terms annexed by law or custom, or by the terms reasonably inferred from the circumstances of the case. The relation being largely a fiduciary one, the obligations are correspondingly high, as will appear hereafter.

Turning then to the subject of the obligations of the principal, we may classify them as follows: —

1. The duty to compensate the agent.
2. The duty to reimburse the agent.
3. The duty to indemnify the agent.

§ 75. Compensation.

An express agreement as to compensation will fix definitely the right and amount of recovery for the agent's services. The agreement may further fix the manner of payment or the means of ascertaining when the compensation has been earned, or it may fix a condition upon the happening of which the compensation shall be deemed to be earned.[1] In all such cases the terms fixed by the parties will be conclusive of the reciprocal rights and obligations.[2]

In the absence of an express agreement as to compensation, there will arise an implied agreement to pay whatever the services are reasonably worth, under all circumstances where a reasonable man would infer that the services were not in-

[1] Cutter *v.* Powell, 6 T. R. 320.

[2] Wallace *v.* Floyd, 29 Pa. St. 184; Zerrahn *v.* Ditson, 117 Mass. 553; Green *v.* Mules, 30 L. J. C. P. 343; Bower *v.* Jones, 8 Bing. 65.

tended to be gratuitous.[1] In these cases the principal question is, was any compensation intended? The answer must be sought in the circumstances of the transaction. If they are such as to lead to a reasonable inference that payment is mutually intended, then payment may be enforced; but if they are such as to lead to a reasonable inference that the services were intended to be gratuitous, then, however valuable they may prove to be, no payment for them can be enforced against the one benefited. In the application of this test some subsidiary considerations may be assumed to be settled. *First*, if the services were rendered on request there is a presumption that compensation was intended,[2] except where the transaction is between near relatives.[3] In the latter case there must be not only the express request but also an express promise, for otherwise the reasonable inference, arising from the relation of the parties, is that the services are intended to be gratuitous.[4] So, also, the presumption arising from the request may be rebutted by the existence of other attendant circumstances, as where the services are competitive, or are rendered on the chance of future employment, or compensation is at the will of the principal.[5] *Second*, where there is no express request, the circumstances of the transaction may raise an implied request, or an implied acceptance of an offer, and therewith an implied promise to pay.[6] These cases should be sharply distinguished from those where the services are rendered at the request of an employee of the principal, and the question is whether the employee is an agent by necessity.[7] *Third*, where there is neither an express or im-

[1] Bryant *v.* Flight, 5 M. & W. 114; Masson *v.* Bathie, 2 Macq. H. L. Cas. 80; McCrary *v.* Ruddick, 33 Iowa, 521.

[2] Weston *v.* Davis, 24 Me. 374; Weeks *v.* Holmes, 12 Cush. (Mass.) 215; Van Arman *v.* Byington, 38 Ill. 442.

[3] Hertzog *v.* Hertzog, 29 Pa. St. 465; Hays *v.* McConnell, 42 Ind. 285, Scully *v.* Scully's Extr., 28 Iowa, 548.

[4] *Ibid.*

[5] Palmer *v.* Haverhill, 98 Mass. 487; Scott *v.* Maier, 56 Mich. 554; Taylor *v.* Brewer, 1 M. & S. 290.

[6] McCrary *v.* Ruddick, 33 Iowa, 521; Shelton *v.* Johnson, 40 Iowa, 84; Garrey *v.* Stadler, 67 Wis. 512.

[7] See *ante*, § 59.

plied request, nor an express or implied promise, the services are deemed gratuitous however valuable they may have been.[1]

§ 76. Compensation: remedies of agent.

In addition to the general remedies open to all creditors, an agent may have a special remedy in the nature of a lien upon the subject-matter of the agency. Liens are either general or particular. A general lien exists where one has the right to retain possession of goods or chattels as security for a general balance, independent of the transaction in which possession was obtained. A particular lien covers only goods or chattels in respect of which debts or obligations were incurred. Aside from special classes of agents, as factors, bankers and attorneys, the lien of an agent is a special or particular one and extends only to the amount claimed for services or expenditures performed or incurred in behalf of the very property upon which the lien exists,[2] unless by express agreement or by a course of dealing a general lien is to be inferred.[3] This lien extends to property or funds which are the produce or fruit of the agency and which remain in the hands of the agent.[4] The lien, however, is a possessory one and is lost by parting with the possession of the property or funds.[5] In general, the doctrine here follows the doctrine of all common law liens.[6]

General liens, that is, liens for a general balance of account, exist in favor of factors,[7] bankers,[8] and attorneys.[9] Other

[1] Chadwick *v.* Knox, 31 N. H. 226; Bartholomew *v.* Jackson, 20 Johns. (N. Y.) 28. *Cf.* Hicks *v.* Burhans, 10 Johns. (N. Y.) 242.

[2] McKenzie *v.* Nevius, 22 Me. 138; Muller *v.* Pondir, 55 N. Y. 325.

[3] Bock *v.* Gorrisen, 30 L. J. Ch. 39.

[4] Muller *v.* Pondir, 55 N. Y. 325; Nagle *v.* McFeeters, 97 N. Y. 196; Vinton *v.* Baldwin, 95 Ind. 433.

[5] Tucker *v.* Taylor, 53 Ind. 93; Collins *v.* Buck, 63 Me. 459; Levy *v.* Barnard, 2 Moore, 34.

[6] See Jones on Liens, §§ 1–26.

[7] Story on Agency, § 376; Martin *v.* Pope, 6 Ala. 532; McGraft *v.* Rugee, 60 Wis. 406; Matthews *v.* Menedger, 2 McLean (U. S. C. C.), 145; Baring *v.* Corrie, 2 B. & A. 137.

[8] Jones on Liens, § 241; Misa *v.* Currie, 1 App. Cas. 554.

[9] Bowling Green Savings Bank *v.* Todd, 52 N. Y. 489; Hurlbert *v.* Brigham, 56 Vt. 368; *In re* Broomhead, 5 D. & L. 52.

general liens are sometimes created by statute. But the details of this subject are foreign to the purpose of this work.

Ordinarily an agent's remedy against his principal is in an action at law. Where, however, the accounts between them are too long and complicated to be conveniently submitted to a jury, the agent may have an accounting in equity in the nature of equitable assumpsit.[1] This must not be confused with the principal's right to an account against the agent based upon the fiduciary relation.[2]

§ 77. Compensation for unauthorized act

If the service was unauthorized but is subsequently ratified and the benefits accepted by the principal, the agent may, ordinarily, recover for the services in the same way and to the same extent as if the service had been originally authorized.[3] This doctrine must, however, be clearly defined. In the first place the adoption of the act must be intended as a ratification *in toto*, and not merely as an attempt on the part of the principal to avoid further loss, and in the next place it must be remembered that what might establish ratification as between the principal and the third party will not, necessarily, establish it as between the principal and the agent.[4] It is further necessary to distinguish clearly between ratification and a subsequent promise to pay for a gratuitous service; in the latter case there is no consideration for the promise and the agent cannot recover.[5] With these cautions the doctrine may be accepted in broad terms.[6]

§ 78. Compensation: conditions.

The compensation may be made to depend upon the performance of certain conditions. If so, the performance of

[1] Harrington *v.* Churchward, 29 L. J. Ch. 521; Smith *v.* Leveaux, 1 H. & M. 123.

[2] *Post*, § 91; Padwick *v.* Stanley, 9 Hare, 627.

[3] Gelatt *v.* Ridge, 117 Mo. 553; Wilson *v.* Dame, 58 N. H. 392; Delafield *v.* Smith, 101 Wis. 664; Frixione *v.* Tagliaferro, 10 M. P. C. C. 175; Keay *v.* Fenwick, 1 C. P. D. 745.

[4] Triggs *v.* Jones, 46 Minn. 277.

[5] Allen *v.* Bryson, 67 Iowa, 591.

[6] See *ante*, §§ 48, 49

the condition is necessary to establish the claim to compensation.[1] If, however, the condition be performed the agent is entitled to his compensation, even though the principal refuse to avail himself of the results of the service. This last proposition is illustrated by the cases where commissions are promised the agent for the sale of the principal's property, or for the securing of a loan. If the agent finds a purchaser ready, willing and able to purchase on the terms fixed by the principal, he is entitled to his commission although the principal refuse to carry out the sale on those terms, or the sale falls through from other causes.[2] So, if the agent finds one willing to loan to the principal on the terms fixed by the latter, the agent has earned his commission although the principal refuse to accept the loan.[3] In such cases the agent has performed the condition precedent, and the right to compensation is perfected.

§ 79. Compensation: revocation of agency by principal.

When the principal wrongfully revokes the agency in breach of a contract, the agent may: (1) treat the contract as still in existence and sue for the stipulated compensation as it falls due;[4] (2) treat the express contract as rescinded and sue in *quantum meruit* for the value of services performed as upon an implied contract;[5] (3) treat the contract as broken and sue in damages for its breach.[6]

The first remedy is no longer open in most jurisdictions since it has generally been regarded as contrary to social economy to permit the agent to remain idle and recover as for constructive services.[7] Accordingly it has been held that

[1] Green *v.* Mules, 30 L. J. C. P. 343; Cutter *v.* Powell, 6 T. R. 320; Jones *v.* Adler, 34 Md. 440.

[2] Horford *v.* Wilson, 1 Taunt. 12; Lockwood *v.* Levick, 8 C. B. N. S. 603; Moses *v.* Bierling, 31 N. Y. 462; Love *v* Miller, 53 Ind. 294.

[3] Fisher *v.* Drewett, 48 L. J. Ex. 32; Vinton *v.* Baldwin, 88 Ind. 104.

[4] Allen *v.* Colliery Engineer's Co., 196 Pa. St. 512; Strauss *v.* Meertief, 64 Ala. 299; *contra*, Howard *v.* Daly, 61 N. Y. 362.

[5] Prickett *v.* Badger, 1 C. B. N. S. 296.

[6] Howard *v.* Daly, 61 N. Y. 362; Liddell *v.* Chidester, 84 Ala. 508.

[7] Howard *v.* Daly, 61 N. Y. 362 and cases there cited.

if, after revocation, the agent sues for and recovers one instalment of salary, the judgment in that action is a bar to any further action on the contract.[1] But of course this would not be so in jurisdictions that admit this form of remedy under the doctrine of a continuing contract and constructive service.[2]

The second form of remedy proceeds upon the theory that the original express contract is rescinded, and that the principal has agreed to pay what the services are reasonably worth. In such a case the agent is not confined in his recovery to the original contract price, but may recover the full reasonable value of his services, as for benefits conferred.[3]

The third form of remedy is the usual and most effective one. It proceeds upon the theory that the principal has committed a breach of the contract to the damage of the agent, and the latter is allowed to recover whatever damages he can establish. The right of action accrues immediately upon the revocation, even if this be before the time for performance has arrived.[4] If the action is begun before the time for performance has arrived, the damages are *prima facie* the entire stipulated compensation for the term of the hiring;[5] if the action is begun after the agent has entered upon the employment, the damages are the salary already earned, and *prima facie* the stipulated compensation for the unexpired term.[6] To reduce the *prima facie* damages in either of the above cases, the principal would have the burden of showing the probability of the agent's finding similar employment

[1] Alie *v.* Nadeau, 93 Me. 282.

[2] Allen *v.* Colliery Engineer's Co., 196 Pa. St. 512.

[3] Keener on Quasi-Contracts, p. 300; Derby *v.* Johnson, 21 Vt. 17.

[4] Hochster *v.* De la Tour, 2 E. & B. 678; Howard *v.* Daly, 61 N. Y. 362; Dugan *v.* Anderson, 36 Md. 567; Roehm *v.* Horst, 178 U. S. 1. *Contra*, Stanford *v.* McGill, 6 N. Dak. 536.

[5] *Ibid.*

[6] Cutter *v.* Gillette, 163 Mass. 95; Richardson *v.* Eagle Machine Works, 78 Ind. 422; James *v.* Allen County, 44 Ohio St. 226. The theory that the agent can recover damages only down to the time of the trial has some support (Gordon *v.* Brewster, 7 Wis. 355; Sumner *v.* Conhaim, 54 N. Y. Supp. 146), but is contrary to the weight of authority.

during the unexpired term,[1] and the proof must be weighty enough to convince the jury of such reasonable probability. If the action is not brought until after the expiration of the prescribed term, the measure of damages is *prima facie* the unearned stipulated compensation, but the principal may show in mitigation of damages what the agent has earned during that time, or what he might have earned had he acted prudently.[2] The right of the principal to diminish the damages by showing what the agent might earn proceeds on the general doctrine of the law that upon a breach of contract it is the duty of the injured party to act prudently and diligently to prevent loss to himself. The application in the case of agency involves the question as to the duty of the agent to seek other employment. He is bound to exercise reasonable care to that end, but he is not bound to accept a different employment,[3] nor in a different locality,[4] nor with an employer against whom reasonable objections would lie.[5]

If the revocation of the agency be not a breach of the contract, as where the agency is at the will of the principal,[6] or is revoked because of a breach by the agent himself,[7] no damages can be recovered, but only compensation for services actually rendered. If, however, the agent is guilty of such gross misconduct or negligence that the service he has rendered is of no value to his principal, he is not entitled to compensation.[8]

[1] Hamilton *v.* Love, 152 Ind. 641; Howard *v.* Daly, 61 N. Y. 362; Sutherland *v.* Wyer, 67 Me. 64; Cutter *v.* Gillette, 163 Mass. 95; Hand *v.* Clearfield Coal Co., 143 Pa. St. 408.

[2] Howard *v.* Daly, 61 N. Y. 362; Leatherberry *v.* Odell, 7 Fed. Rep. 641; Horn *v.* Western Land Ass'n, 22 Minn. 233.

[3] Costigan *v.* Mohawk, &c. Rd. Co., 2 Denio (N. Y.), 609; Wolf *v.* Studebaker, 65 Pa. St. 459.

[4] Costigan *v.* Mohawk, &c. Rd. Co., 2 Denio (N. Y.), 609; Strauss *v.* Meertief, 64 Ala. 299; Harrington *v.* Gies, 45 Mich. 374.

[5] Strauss *v.* Meertief, 64 Ala. 299.

[6] United States *v.* Jarvis, Daveis (U. S. C. C.), 274.

[7] Lawrence *v.* Gullifer, 38 Me. 532; Massey *v.* Taylor, 5 Cold. (Tenn.) 447.

[8] Dalton *v.* Irvin, 4 C. & P. 289; Bracey *v.* Carter, 12 Ad. & E. 373; Sumner *v.* Reicheniker, 9 Kans. 320.

If there be no contract, or none for a definite time or a definite service, the revocation by the principal gives the agent no remedy.[1] Whether there has been an engagement for a definite time or for definite services so that no irremediable revocation can occur is a question of construction to be settled by the terms of the contract or by custom and usage.[2]

§ 80. Compensation: revocation of agency by law.

The circumstances which will revoke an agency by operation of law have already been pointed out.[3] There may be some incapacity on the part of the principal or some incapacity on part of the agent. In either case the impossibility in question discharges the contract as to both parties, but does not discharge the liability of the principal for services already rendered. In case of death, insanity, illness, imprisonment, or other incapacity or coercion of the agent, he or his representative may recover in quasi-contract for benefits already conferred,[4] unless he has expressly stipulated that he shall not be entitled to compensation under such circumstances,[5] or unless he knows at the time he makes the contract that it will be impossible for him to perform it.[6] In such case, however, the cost of completing an entire contract may be considered in reduction of the claim for benefits conferred.[7] Even where the illness or imprisonment is caused by the fault of the plaintiff he may still recover, as the illness or imprisonment, and not the wrongful act of the agent, is regarded as the proximate cause of the breach.[8]

[1] Simpson *v.* Lamb, 17 C. B. 603; Burton *v.* Great N. Ry., 9 Exch. 507; *In re* London, &c. Bk., L. R. 9 Eq. 149; Rhodes *v.* Forwood, 1 App. Cas. 256.

[2] Queen *v.* Parr, 39 L. J. Ch. 73; Lewis *v.* Ins. Co., 61 Mo. 534.

[3] *Ante*, §§ 70–71.

[4] Wolfe *v.* Howes, 20 N. Y. 197; Hughes *v.* Wamsutta Mills, 11 Allen (Mass.), 201; Green *v.* Gilbert, 21 Wis. 401; Walsh *v.* Fisher, 102 Wis. 172.

[5] Cutter *v.* Powell, 6 T. R. 320.

[6] Jennings *v.* Lyons, 39 Wis. 553.

[7] Ricks *v.* Yates, 5 Ind. 115; Wolfe *v.* Howes, 20 N. Y. 197. Hughes *v.* Wamsutta Mills, *supra*.

Bankruptcy of the principal, however, does not discharge the estate from liability for damages, though it revokes the authority of the agent.[1] But in case of revocation in consequence of the death of the principal, no damages may be recovered but only compensation earned.[2]

§ 81. **Compensation: renunciation of agency by agent.**

Where the agent renounces the agency in breach of the contract, it is generally held that he can recover nothing for the services already performed. It is due to his own fault that the contract is not completed, and most of the courts refuse to depart in his behalf from the severe rule of the law, which forbids a man to profit from his own wrong.[3] But a few jurisdictions have been led from considerations of the hardships of the case to permit a recovery in *quantum meruit* for the services actually performed, so far as the value of such services exceeds the damage resulting from the breach.[4] The two classes of cases are irreconcilable, and it is necessary to know what is held in each jurisdiction where the question may arise.

The above applies to the cases of indivisible contracts, or to one partly performed division of a divisible contract.

But how of a divisible contract in which one or more parts have been fully performed? If the agreement is that the agent shall work a year at a given price per month, or at a given commission on actual sales, payable as the work or sales progress, then the agent upon abandoning the contract would be able to maintain an action for the full months he

[1] Vanuxem *v.* Bostwick, 19 W. N. C. (Pa.) 74; s. c. 7 Atl. Rep. 598.

[2] Yerrington *v.* Greene, 7 R. I. 589.

[3] Stark *v.* Parker, 2 Pick. (Mass.) 267; Miller *v.* Goddard, 34 Me. 102; Hutchinson *v.* Wetmore, 2 Cal. 310; Ripley *v.* Chipman, 13 Vt. 268; Henson *v.* Hampton, 32 Mo. 408; Martin *v.* Schoenberger, 8 W. & S. (Pa.) 367; Diefenback *v.* Stark, 56 Wis. 462; Timberlake *v.* Thayer, 71 Miss. 279.

[4] Britton *v.* Turner, 6 N. H. 481; McClay *v.* Hedge, 18 Iowa, 66; Downey *v.* Burke, 23 Mo. 228 (but see Henson *v.* Hampton, *supra*); Duncan *v.* Baker, 21 Kans. 99; Parcell *v.* McComber, 11 Neb. 209; Coe *v.* Smith, 4 Ind. 79; Allen *v.* McKibbin, 5 Mich. 449.

actually served, or the commissions actually earned, subject to a counter-claim for damages for the non-performance of the entire contract. This proceeds upon the theory that in effect there are twelve contracts in one, and that the breach of (say) the fifth is no bar to an action for the full performance of the first, second, third, and fourth. But the fifth, and the succeeding ones, are abandoned, and the defendant is entitled to damages for their breach. The most serious difficulty in these cases is to determine whether a contract is in fact divisible or indivisible.[1] This is really a question of construction depending upon the ascertainment of the intent of the parties. The general tendency seems to be to hold contracts of service entire rather than severable, although payment may be stipulated for by instalments.[2]

If an infant renounce his employment, he may nevertheless recover the value of his services without abatement for damages for breach, since an infant may always rightfully avoid such a contract.[3] But remaining in the employment after reaching majority ratifies the contract, and a subsequent breach is within the general rule.[4]

§ 82. Compensation: agent acting for both parties.

Where an agent acts for both parties, his right to compensation from either depends upon the knowledge or want of knowledge by the principal that his agent was acting for the other party. If therefore A acts as agent for both X and Y in a transaction between the two, A may recover from both if each knew that A was acting for the other also;[5] but A

[1] On this see Huffcut's Anson on Cont. pp. 363–369; Norrington *v.* Wright, 115 U. S. 188; Cahen *v.* Platt, 69 N. Y. 348; Gerli *v.* Poidebard Silk Mfg. Co., 57 N. J. L. 432.

[2] Diefenback *v.* Stark, 56 Wis. 462; Wilson *v.* Board of Education, 63 Mo. 137; Davis *v.* Maxwell, 12 Metc. (Mass.) 286; Widrig *v.* Taggart, 51 Mich. 103.

[3] Judkins *v.* Walker, 17 Me. 38; Moses *v.* Stevens, 2 Pick. (Mass.) 332; Wheatly *v.* Miscal, 5 Ind. 142; Lufkin *v.* Mayall, 25 N. H. 82.

[4] Forsyth *v.* Hastings, 27 Vt. 646.

[5] Bell *v.* McConnell, 37 Oh. St. 396; Alexander *v.* University, 57 Ind. 466; Adams Mining Co. *v.* Senter, 26 Mich. 73.

cannot recover from either if neither knew of the double agency;[1] and if the agent has been paid in ignorance of this fact the money may be recovered back by the principal.[2] But how if X knew A was also acting for Y, but Y did not know A was acting for X? Clearly A cannot recover from Y. Can he recover from X? The non-liability of the second employer having knowledge of the first employment has been maintained.[3]

If, however, the province of the agent is merely to bring the parties together, and not to advise as to the terms of their contract, he may recover from both parties if he act as the agent of both, since there is nothing inconsistent with a double agency in such a case.[4] And if, in accordance with the rules of a stock exchange, a broker who has orders from one customer to purchase, and from another to sell, a certain stock, procures another member of the exchange to act for one of the parties, the transaction will be upheld.[5] So also if the agent's duties to one principal have been fully discharged, he may then act for the other party to the contract.[6] If two agents agree that they will share the commissions received on an exchange of their principals' property, the agreement is illegal as it contemplates a fraud on the principals.[7]

§ 83. Compensation: illegal services.

Where the services of the agent have been rendered in an unlawful undertaking to which he is privy, he can recover no compensation. This applies to lobbying contracts,[8] contracts for improperly influencing executive officers,[9] marriage broker-

[1] Salomons *v.* Pender, 3 H. & C. 639; Scribner *v.* Collar, 40 Mich. 375; Rice *v.* Wood, 113 Mass. 133; Lynch *v.* Fallon, 11 R. I. 311; McDonald *v.* Maltz, 94 Mich. 172.

[2] Cannell *v.* Smith, 142 Pa. St. 25.

[3] See Bell *v.* McConnell, 37 Oh. St. 396 and cases cited.

[4] Montross *v.* Eddy, 94 Mich. 100.

[5] Terry *v.* Birmingham N. Bk., 99 Ala. 566.

[6] Short *v.* Millard, 68 Ill. 292.

[7] Levy *v.* Spencer, 18 Colo. 532.

[8] Trist *v.* Child, 21 Wall. (U. S.) 441.

[9] Tool Co. *v.* Norris, 2 Wall. (U. S.) 45. *Cf.* Lyon *v.* Mitchell, 36 N. Y. 235.

age contracts,[1] contracts of brokers for dealing in betting "futures,"[2] and the like.[3] Where a statute or ordinance provides that any person acting as real estate broker without a license shall be subject to a penalty, a broker acting without a license cannot recover his commissions.[4] Where the statute forbids an attorney to be present at the taking of depositions upon interrogatories unless both sides are represented, he cannot recover compensation for such services in violation of the statute.[5] At common law an agreement of an attorney to carry on a suit and look to the proceeds of the suit alone for his compensation is champertous and void.[6] But this rule has been much modified in the modern law, and such agreements are now generally upheld in the United States.[7]

§ 84. **Reimbursement.**

An agent is entitled to be reimbursed for all sums which he has paid out, or become individually and solely liable for, in the due course of the agency and for the principal's benefit.[8] The expenses or outlays must have been reasonably necessary in due course, and not unreasonable in amount, or occasioned by the default or negligence of the agent himself.[9] Thus an attorney who, under implied authority, has indemnified an officer for making a levy, may recover from the client the loss suffered in consequence of such indemnity.[10] If the contract

[1] Duval *v.* Wellman, 124 N. Y. 156.

[2] Irwin *v.* Williar, 110 U. S. 499.

[3] Gibbs *v.* Baltimore, &c. Co., 130 U. S. 396; Bixby *v.* Moor, 51 N. H. 402; Josephs *v.* Pebrer, 3 B. & C. 639; Allkins *v.* Jupe, 2 C. P. D. 375.

[4] Cope *v.* Rowlands, 2 M. & W. 149; Palk *v.* Force, 12 Q. B. 666; Buckley *v.* Humason, 50 Minn. 195.

[5] Comfort *v.* Graham, 87 Iowa, 295.

[6] Ackert *v.* Barker, 131 Mass. 436; Blaisdell *v.* Ahern, 144 Mass. 393.

[7] Huffcut's Anson on Cont. pp. 246, 247; Reece *v.* Kyle, 49 Oh. St. 475; Stanton *v.* Embrey, 93 U. S. 548; Fowler *v.* Callan, 102 N. Y. 395.

[8] Maitland *v.* Martin, 86 Pa. St. 120; Ruffner *v.* Hewitt, 7 W. Va. 585; Warren *v.* Hewitt, 45 Ga. 501; Cropper *v.* Cook, L. R. 3 C. P. 194.

[9] Lewis *v.* Samuel, 8 Q. B. 685; Duncan *v.* Hill, L. R. 8 Ex. 242; Godman *v.* Meixsel, 65 Ind. 32.

[10] Clark *v.* Randall, 9 Wis. 135.

was obviously, or to the knowledge of the agent for an illegal purpose, he can have no reimbursement or indemnity for outlays or losses.[1]

§ 85. Indemnity.

The agent is entitled to indemnity against the consequences of all acts performed in the due execution of his authority which are not illegal or due to his own default.[2] Even as to the performance of illegal acts he may claim indemnity if he did not know they were illegal and if they were not in fact contrary to good morals or general public policy.[3] Thus an auctioneer who innocently sells for his principal goods belonging to a third person is entitled to indemnity in case he is obliged to respond to the true owner for conversion.[4] So an innkeeper who detains a person under arrest at the solicitation of an officer may recover indemnity if he is obliged to pay damages to the involuntary guest for false imprisonment.[5] These cases escape the general rule that there is no indemnity or contribution between joint tort-feasors.

If the transaction is illegal, and known to the agent to be so, or if though not known to the agent to be illegal, it is a prohibited act, or against general public policy, the agent is not entitled to indemnity. Thus the English courts held prior to the Gaming Act of 1892,[6] that an agent who has paid money for his principal or incurred liabilities on wagers could recover since wagers were unenforceable or void, and not illegal.[7] Since the Gaming Act which renders wagers illegal, the holding has been otherwise.[8] In this country wagering

[1] *Ex parte* Mather, 3 Ves. 373; Allkins *v.* Jupe, 2 C. P. D. 375; Mohr *v.* Miesen, 47 Minn. 228.

[2] D'Arcy *v.* Lyle, 5 Binney (Pa.), 441; Saveland *v.* Green, 36 Wis. 612; Maitland *v.* Martin, 86 Pa. St. 120.

[3] Bibb *v.* Allen, 149 U. S. 481, 498; Moore *v.* Appleton, 26 Ala. 633; 34 Ala. 147.

[4] Adamson *v.* Jarvis, 4 Bing. 66; Castle *v.* Noyes, 14 N. Y. 329.

[5] Fletcher *v.* Harcot, Hutton, 55.

[6] 55 Vict. c. 9.

[7] Thacker *v.* Hardy, L. R. 4 Q. B. D. 685; Read *v.* Anderson, L. R. 13 Q. B. D. 779.

[8] Tatam *v.* Reeve, 1893, 1 Q. B. 44.

contracts are generally illegal, and not merely void, and disbursements and liabilities of the agent are, if he knows the transaction is a wager, at his own risk since he become *particeps criminis*.[1] If the transaction is one which the agent ought to know is illegal, he cannot recover indemnity although in fact he believed it to be legal.[2]

If the loss is due to the agent's own negligence or default he cannot recover indemnity.[3]

§ 86. Non-assignability of obligations or rights.

The rule of law is strict that no one can assign his obligations.[4] Accordingly the principal cannot assign to a third person the obligations which by his contract he undertakes toward his agent. On the other hand the general rule is that rights or benefits under a contract may be assigned.[5] Yet an exception occurs in the case of agency. A principal cannot assign his rights to the services of the agent, since the agent is not bound to assume a fiduciary relation toward the assignee or consent to be governed by the latter.[6] It follows that a principal can assign neither his rights nor his obligations under the contract of agency. He may with the consent of the agent or servant transfer the services to another, so as to make that other temporarily the principal or master.[7]

[1] Harvey *v.* Merrill, 150 Mass. 1; Mohr *v.* Miesen, 47 Minn. 228.

[2] Coventry *v.* Barton, 17 Johns. (N. Y.) 142.

[3] Capp *v.* Topham, 6 East, 392; Duncan *v.* Hill, L. R. 8 Ex. 242 See Hartas *v.* Ribbons, 22 Q. B. D. 254.

[4] *Post*, § 94.

[5] Huffcut's Anson on Cont. Pt. III. Ch. ii.

[6] *Ibid.;* Hayes *v.* Willio, 4 Daly (N. Y. C. P.), 259.

[7] *Post*, § 228 *et seq.*

CHAPTER VIII.

OBLIGATIONS OF AGENT TO PRINCIPAL.

1. *Agents by Contract.*

§ 87. Statement of obligations.

An agent may act for a reward, that is, for a valuable consideration, or he may act gratuitously. If he acts for reward, he is under contract and must perform the undertaking or pay damages. If he enters into an undertaking gratuitously, he is not bound to perform.[1] We deal first with the obligations of agents who undertake to act for a valuable consideration.

The obligations of the agent to the principal are in the main as follows: —

1. The duty to obey the instructions of the principal.
2. The duty to exercise the skill, judgment, and care necessary to the prudent discharge of the agency.
3. The duty to act with the highest good faith in the management of the principal's interests.
4. The duty to account fully for all the proceeds and profits of the agency.
5. The duty to act in person, except where authorized by his principal or by custom to act through sub-agents.

§ 88. (I.) Obedience.

Agency is a means of expressing the will of the principal. The agent contracts that he will serve as the means to that end, and the measure of his obedience is his conformity to the dominant will. So long as the agent correctly carries out the will of his principal he is protected, but if he fails to be directed by it, and loss ensues, he becomes liable for the

[1] *Post*, § 97.

deviation.[1] It is no answer even that he used reasonable care and diligence in the course he pursued; he pursues it at his own risk since it is contrary to his instructions, and it is not for him to judge of the reasonableness of such instructions.[2] Thus where the principal directed the agent to return a draft at once if it was not paid, but the agent held the draft in order to give the drawee an opportunity to communicate with the drawer, and loss ensued, the agent was held liable for the loss.[3] So where an agent is directed by his principal to send a claim for collection to A, but sends it to B, and loss ensues, the agent is liable, and it is no defence that he acted prudently in sending it to B, since he had no right of choice whatever under his instructions.[4] So where a landlord gave his agent a license for the lessee to assign the lease, but directed the agent not to deliver it until the lessee paid the arrears of rent, and the agent on receipt of a check delivered the license, and the check was dishonored, the agent was held liable for the loss.[5] So if the agent parts with the principal's goods contrary to instructions he becomes liable for conversion.[6] Generally however he is liable simply for a breach of the contract. If the instruction be to do an illegal act, the agent is not liable for failure to obey.[7]

If the agent has a lien upon the goods entrusted to him for sale at a minimum price, he is entitled to sell at a fair market price, although below that fixed by the principal, in case the latter, after due notice, refuses to repay the agent's advances.[8]

A deviation from instructions may be ratified by the prin-

[1] Barber *v.* Taylor, 5 M. & W. 527; Adams *v.* Robinson, 65 Ala. 586; Frothingham *v.* Everton, 12 N. H. 239; cases cited below.

[2] Rechtscherd *v.* Accommodation Bank, 47 Mo. 181; Wilson *v.* Wilson, 26 Pa. St. 393.

[3] Whitney *v.* Merchants' Union Exp. Co., 104 Mass. 152.

[4] Butts *v.* Phelps, 79 Mo. 302.

[5] Pape *v.* Westacott, 1894, 1 Q. B. 272.

[6] Laverty *v.* Snethen, 68 N. Y. 522.

[7] Bexwell *v.* Christie, Cowp. 395; Cohen *v.* Kittell, 22 Q. B. D. 680.

[8] Parker *v.* Brancker, 22 Pick. (Mass.) 40; Marfield *v.* Goodhue, 3 N. Y. 62.

cipal and in some cases silence after full knowledge of the facts may amount to ratification.[1]

§ 89. (II.) Prudence.

An agent acting for a valuable consideration is bound to possess and to exercise a reasonable degree of skill, care, and diligence. The measure of such skill, care, and diligence is governed by the nature of the undertaking, by the customs and usages of the profession or business, and by the circumstances of the case, but generally speaking, it may be said to be such a degree as is ordinarily observed by prudent men engaged in similar undertakings, and under similar circumstances.[2]

One who assumes to act as a patent solicitor is bound to possess and to exercise the knowledge and skill pertaining to such a profession, and is liable to his principal for injury caused by ignorance or negligence.[3] An agent dealing in rentals is bound to use reasonable care to ascertain the solvency of tenants.[4] An agent vested with discretion as to purchases is bound to exercise the discretion prudently and reasonably in conformity with the general instructions.[5] An agent authorized to purchase timber lands must use due care in transmitting descriptions to his principal, but does not warrant the accuracy of such descriptions.[6] An agent must use due care to notify his principal of facts affecting the security of the latter's property entrusted to the agent, and a failure to do so renders the agent liable to his principal.[7] An agent authorized to loan money is liable for negligently loaning

[1] Bray *v.* Gunn, 53 Ga. 144; Hazard *v.* Spears, 4 Keyes (N. Y.), 469.

[2] Beal *v.* South Devon Ry., 3 H. & C. 337; Leighton *v.* Sargent, 27 N. H. 460; Wright *v.* Central R. Co., 16 Ga. 38; Heinemann *v.* Heard, 50 N. Y. 27, 35; Whitney *v.* Martine, 88 N. Y. 535.

[3] Lee *v.* Walker, L. R. 7 C. P. 121.

[4] Heys *v.* Tindall, 1 B. & S. 296.

[5] Heinemann *v.* Heard, 50 N. Y. 27.

[6] Page *v.* Wells, 37 Mich. 415.

[7] Devall *v.* Burbridge, 4 W. & S. (Pa.) 305; Storer *v.* Eaton, 50 Me. 219.

upon worthless or imprudent securities.[1] An agent authorized to effect insurance must use due care to select a solvent insurer and secure a sufficient and adequate policy.[2] Agents authorized to collect debts or commercial paper must exercise diligence and care, use all ordinary or customary means, and employ the available remedies.[3] If commercial paper is in an agent's hands for collection, he must take care to make due presentment, and demand and give due notice of dishonor.[4] Ordinarily an agent for collection must take only money in payment, and if he takes checks or other securities is liable for any damages that accrue to the principal.[5] But usage may authorize the taking of checks.[6]

In general, the same rules apply to a breach of the contract resulting from the agent's negligence, as to a breach resulting from the agent's disobedience of instructions. An agent is presumed by law to warrant that he possesses and will exercise such a degree of skill as is reasonably demanded by the nature and circumstances of his undertaking; and for a breach of this implied warranty he will of course be liable in damages. But he does not undertake an absolute liability.[7] If the principal has knowledge or notice of the agent's deficiency in skill, the presumption of a warranty is negatived.[8]

The measure of damages in an action by a principal against his agent for negligence is such loss sustained thereby as is the reasonable and probable consequence of such negligence.[9]

[1] Whitney *v.* Martine, 88 N. Y. 535; Bannon *v.* Warfield, 42 Md. 22.

[2] Turpin *v.* Bilton, 5 Man. & G. 455; Mallough *v.* Barber, 4 Camp. 150; Strong *v.* High, 2 Rob. (La.) 103.

[3] Allen *v.* Suydam, 20 Wend. (N. Y.) 321.

[4] Allen *v.* Merchants' Bank, 22 Wend. (N. Y.) 215; First N. B. *v.* Fourth N. B., 77 N. Y. 320.

[5] Hall *v.* Storrs, 7 Wis. 253; Harlan *v.* Ely, 68 Cal. 522; Ward *v.* Smith, 7 Wall. (U. S.) 447.

[6] Russell *v.* Hankey, 6 T. R. 12.

[7] Page *v.* Wells, 37 Mich. 415.

[8] Felt *v.* School Dis., 24 Vt. 297.

[9] Smith *v.* Price, 2 F. & F. 748; Whiteman *v.* Hawkins, 4 C. P. D. 13; Neilson *v.* James, 9 Q. B. D. 546.

§ 90. (III.) **Good faith.**

The relation existing between a principal and his agent is a fiduciary one, and consequently the most absolute good faith is essential. The principal relies upon the fidelity and integrity of the agent, and it is the duty of the agent, in return, to be loyal to the trust imposed in him, and to execute it with the single purpose of advancing his principal's interests.[1]

Upon the general principle just stated the courts will not permit an agent to take any position, or to acquire any rights or interests that are antagonistic to those of the principal. He should not attempt to act for both parties to the same transaction without their consent,[2] or in any way to use his authority for his own benefit.[3] Thus, an agent with instructions to lease or purchase property for his principal, cannot, except with his principal's consent, lease or purchase it from himself.[4] Nor will one authorized to sell or let property, be permitted to become the purchaser or lessee.[5] In either case the principal may repudiate the transaction. And this is true, even though the motive of the agent is perfectly honest, and his action beneficial to the principal. The law sees only the evil and dangerous tendency of such transactions, and upon grounds of public policy refuses to enforce them in any case.[6]

[1] Michoud *v.* Girod, 4 How. (U. S.) 503.

[2] Raisin *v.* Clark, 41 Md. 158; Walker *v.* Osgood, 98 Mass. 348; N. Y., &c. Ins. Co. *v.* Ins. Co., 20 Barb. (N. Y.) 468; Hinckley *v.* Arey, 27 Me. 362; Meyer *v.* Hanchett, 39 Wis. 419. *Cf.* Rupp *v.* Sampson, 16 Gray (Mass.), 398; Orton *v.* Scofield, 61 Wis. 382; Nolte *v.* Hulbert, 37 Oh. St. 445; Greenwood, &c. Co. *v.* Georgia Home Ins. Co., 72 Miss. 46.

[3] Bunker *v.* Miles, 30 Me. 431.

[4] Gillett *v.* Peppercorne, 3 Beav. 78; Conkey *v.* Bond, 36 N. Y. 427; Taussig *v.* Hart, 58 N. Y. 425; Tewksbury *v.* Spruance, 75 Ill. 187; Boswell *v.* Cunningham, 32 Fla. 277; Davis *v.* Hamlin, 108 Ill. 39; Greenfield Sav. Bk. *v.* Simons, 133 Mass. 415.

[5] Oliver *v.* Court, 8 Price, 127; Thompson *v.* Havelock, 1 Camp. 527; Kerfoot *v.* Hyman, 52 Ill. 512; Eldridge *v.* Walker, 60 Ill. 230; Martin *v.* Moulton, 8 N. H. 504; People *v.* Township Bd., 11 Mich. 222; Bain *v.* Brown, 56 N. Y. 285.

[6] Michoud *v.* Girod, 4 How. (U. S.) 503; People *v.* Township Bd., 11 Mich. 222; Taussig *v.* Hart, 58 N. Y. 425.

Even a custom which converts an agent into a principal, or puts him into a position antagonistic to the interests of his principal, cannot be given effect unless known to the principal and at least impliedly assented to by him.[1]

An agent cannot, through a failure to perform his duty, acquire interests in conflict with those of his principal. For example, an agent instructed to pay the taxes on his principal's property, and neglecting so to do, cannot acquire a valid title to the land by purchase upon tax sale, but will be regarded as a trustee for his principal.[2] And an agent whose duty it is to compromise a claim against his principal, may not purchase the claim at a discount, and then enforce it in full against his principal.[3] An attorney engaged to advise on a title cannot purchase an outstanding adverse title and set it up against his client; he will hold the adverse title in trust for the latter.[4] An agent of a corporation commits a breach of trust if he undertakes to secure voting proxies from shareholders in order to oust an existing board of directors.[5]

Upon the same doctrine one who deals with an agent knowing that the latter is not in that transaction showing good faith toward his principal, deals at his peril as a party to the agent's bad faith or fraud.[6] Good faith requires the agent to give notice to the principal of all facts coming to his knowledge which may affect the principal's interests.[7]

An agent may be prevented by injunction from disclosing trade secrets of his employer learned while in the employment.[8]

[1] Robinson *v.* Mollett, L. R. 7 H. L. 802; De Bussche *v.* Alt, L. R. 8 Ch. Div. 286.

[2] Barton *v.* Moss, 32 Ill. 50; Krutz *v.* Fisher, 8 Kans. 90; Fisher *v.* Krutz, 9 Kans. 501; Geisinger *v.* Beyl, 80 Wis. 443.

[3] Noyes *v.* Landon, 59 Vt. 569.

[4] Eoff *v.* Irvine, 108 Mo. 378.

[5] Townsley *v.* Bankers' Life Ins. Co., 56 App. Div. 232.

[6] Hegenmyer *v.* Marks, 37 Minn. 6.

[7] Devall *v.* Burbridge, 4 W. & S. (Pa.) 305; Storer *v.* Eaton, 50 Me 219.

[8] Robb *v.* Green, 1895, 2 Q. B. 315; Louis *v.* Smellie, 73 L. T. R. 226; Little *v.* Gallus, 4 N. Y. App. Div. 569.

Akin to the rule of loyalty and good faith is one to the effect that an agent may not deny his principal's title.[1] When, by virtue of his fiduciary relation to the principal, an agent comes into the possession of the principal's money or property, and is subsequently called upon by the principal to account for it, he will not be allowed, as a general rule, to dispute the title of the principal in such money or property. He may show in defence, however, that he has been divested of the property by one holding a paramount title,[2] or that the principal's title has either been terminated or transferred to the person under whom he claims.[3] Likewise, an agent cannot, in defence of an action by his principal to recover money in his hands, set up the illegality of the transaction under which he received it or of the purpose to which it was to be devoted.[4] In like manner an agent who receives money to the use of his principal is bound to pay it over notwithstanding any claims of third persons.[5] But if it is paid to the agent wrongfully, or under duress, or under a mistake of fact, he may repay it to the person who so paid it to him.[6]

§ 91. (IV.) Accounting.

It is the duty of an agent to keep his principal's money and property separate from his own or third parties, to keep accurate accounts of all dealings with the same, to preserve and produce upon demand all documents relating to the same, to render an account of his transactions, and to deliver or pay over to the principal, upon demand, all property, documents, or money, belonging to the principal, and all profits resulting therefrom,[7] including all profits which have accrued to the

[1] Green *v.* Maitland, 4 Beav. 524; Betteley *v.* Reed, 4 Q. B. 511; Collins *v.* Tillou, 26 Conn. 368.

[2] Biddle *v.* Bond, 6 B. & S. 225; Bliven *v.* Hudson River Rd. Co., 36 N. Y. 403, 406; Western Trans. Co. *v.* Barber, 56 N. Y. 544, 552.

[3] Marvin *v.* Ellwood, 11 Paige's Ch. (N. Y.) 365.

[4] Baldwin Bros. *v.* Potter, 46 Vt. 402; Kiewert *v.* Rindskopf, 46 Wis. 81; Snell *v.* Pells, 113 Ill. 145.

[5] Nickolson *v.* Knowles, 5 Madd. 47; Roberts *v.* Ogilby, 9 Price, 269.

[6] *Post*, § 204.

[7] Gray *v.* Haig, 20 Beav. 219; Clarke *v.* Tipping, 9 Beav. 284; Dads-

agent as a result of his transactions,[1] whether such transactions were within or without the scope of the authority,[2] and whether legal or illegal.[3]

(1) *Keeping property and money separate.* If an agent commingles the goods or money of his principal with his own, so that the separate interests cannot be easily or accurately distinguished, everything not clearly proved to be his own, will be deemed to belong to the principal.[4] If an agent deposits his principal's money in a bank in his own name or to his own account, he is the loser in case the bank fails. Funds deposited in the principal's name, or taken by a bank or other person with notice of the principal's interest, are in the nature of trust funds, and may be followed by the principal until they pass into the hands of a purchaser for value without notice.[6]

(2) *Keeping of accounts.* If the nature of the undertaking requires, it is the duty of an agent to keep reasonably full, regular, and accurate accounts of his business, including both receipts and disbursements, and to preserve all vouchers and other evidential papers which may be of value to his principal.[7] If an agent fails to keep intelligible and accurate accounts, everything will be presumed against him that is consistent with the established facts of the case.[8]

(3) *Rendering accounts.* It is the duty of an agent to render a full and accurate account to his principal of all trans-

well *v.* Jacobs, 34 Ch. Div. 278; Harsant *v.* Blaine, 56 L. J. Q. B. 511; Jett *v.* Hempstead, 25 Ark. 462; Baldwin *v.* Potter, 46 Vt. 402.

[1] Gardner *v.* Ogden, 22 N. Y. 327; Dutton *v.* Willner, 52 N. Y. 312; Lafferty *v.* Jelly, 22 Ind. 471.

[2] Watson *v.* Union Iron Co., 15 Brad. (Ill.) 509.

[3] Tenant *v.* Elliott, 1 B. & P. 3; Baldwin Bros. *v.* Potter, 46 Vt. 402.

[4] Gray *v.* Haig, 20 Beav. 219; Lupton *v.* White, 15 Ves. 432; Hart *v.* Ten Eyck, 2 Johns. Ch. (N. Y.) 62.

[5] Massey *v.* Banner, 1 Jac. & W. 241; Williams *v.* Williams, 55 Wis. 300; Naltner *v.* Dolan, 108 Ind. 500.

[6] *Post*, § 178.

[7] Gray *v.* Haig, 20 Beav. 219; Clarke *v.* Tipping, 9 Beav. 284; Dadswell *v.* Jacobs, 34 Ch. Div. 278; Haas *v.* Damon, 9 Iowa, 589; Kerfoot *v.* Hyman, 52 Ill. 512.

[8] Gray *v.* Haig, *supra*.

actions connected with the agency, and, since the relation is a fiduciary one, the principal has a right to compel the rendering of such an account in equity.[1] This equitable remedy is not based upon the complicated nature of the accounts (equitable assumpsit),[2] but rests upon the fiduciary nature of the relationship.[3] Even in the case of accounts rendered and accepted, the account may be reopened in equity on the ground of fraud.[4] An agent sued as a fiduciary is not, ordinarily, permitted to plead the Statute of Limitations unless he has in fact rendered an account, or demand has been made upon him to do so.[5]

Although the right of set-off or counter-claim ordinarily exists in favor of an agent, he will not be permitted to enforce it in cases where such enforcement would be in direct violation of the agent's duty as a fiduciary. For example, if a principal directs his agent to collect a debt and to apply it first to the payment of certain demands due to third persons, and then to the payment of a mortgage held by the agent, but the agent collects the debt and applies it all to the payment of his own claim, the principal may recover the sum collected by the agent, and applicable to the payment of the third persons' claims, since the agent has acted in breach of his special trust.[6]

(4) *Delivery of property and profits.* The agent must deliver to the principal, upon demand, all the property of the principal in his hands, all proceeds of property disposed of, and all profits accruing from the agency.[7] The agent cannot, without the consent of his principal, make for himself any personal

[1] Makepeace *v.* Rogers, 4 De G. J. & S. 649; Marvin *v.* Brooks, 94 N. Y. 71; Warren *v.* Holbrook, 95 Mich. 185; Rippe *v.* Stogdill, 61 Wis. 38.

[2] Langdell, 3 Harv. Law Rev. 237; *ante*, § 76.

[3] Padwick *v.* Stanley, 9 Hare, 627.

[4] Williamson *v.* Barbour, 9 Ch. Div. 529.

[5] Teed *v.* Beere, 28 L. J. Ch. 782; Burdick *v.* Garrick, L. R. 5 Ch. 233; Jett *v* Hempstead, 25 Ark. 462; Mandeville *v.* Welch, 5 Wheat. (U. S.) 277.

[6] Tagg *v.* Bowman, 108 Pa. St. 273.

[7] Topham *v.* Braddick, 1 Taunt. 572; Crosskey *v.* Mills, 1 C. M. & R. 298.

profits in the conduct of the principal's business. He must, accordingly, pay over to his principal all such profits made in the course of the agency.[1] This rule is applicable, even in cases where the agent took the risk of loss,[2] or the principal suffered no injury.[3] No secret profits, or profits made in breach of the trust, are permitted to remain in the hands of the agent. If the agent receives a bribe, he must pay it over to his principal.[4]

§ 92. **(V.) Delegation of authority: appointment of sub-agents.** In all matters involving judgment, skill, or discretion, it is the duty of an agent to act in person unless he has the express or implied authority of his principal to employ sub-agents. No agent can without such permission from his principal delegate his discretionary authority. *Delegatus non potest delegare* is the maxim, and is founded upon the confidential character of the relation.[5]

The doctrine involves, however, three quite distinct considerations: *first*, the delegation to a deputy of the performance of mechanical or ministerial acts in execution of the plan determined upon by the agent; *second*, the delegation to a sub-agent of some discretionary power without seeking to create any privity between such sub-agent and the principal; *third*, the appointment of a second agent as the agent of the principal, and therefore in privity with him. The first case has to do with the delegation of non-discretionary duties; the second, with the delegation of discretionary duties; the third, with the performance of the duty or power to employ agents for the principal. In the first two cases the agent is acting for himself in employ-

[1] Parker *v.* McKenna, L. R. 10 Ch. 96; De Bussche *v.* Alt, 8 Ch. Div. 286; *In re* North Australian Territory Co., 1892, 1 Ch. D. 322; Eldridge *v.* Walker, 60 Ill. 230; Dutton *v.* Willner, 52 N. Y. 312; Bunker *v.* Miles, 30 Me. 431.

[2] Williams *v.* Stevens, L. R. 1 P. C. 352.

[3] Parker *v.* McKenna, *supra.*

[4] Mayor *v.* Lever, 1891, 1 Q. B. 168.

[5] Combe's Case, 9 Co. R. 75; Blore *v.* Sutton, 3 Meriv. 237; Catlin *v.* Bell, 4 Camp. 183; Cockran *v.* Irlam, 2 M. & S. 301; Campbell *v.* Reeves, 3 Head (Tenn.), 226; Loomis *v.* Simpson, 13 Iowa, 532.

ing his assistants; in the third case he is acting for his principal in employing them. In neither of the first two cases can there be any privity between the sub-agents and the principal, and the sole question is, had the agent any authority to act through such sub-agents, or should he have acted in person? In the third case the sole question is, was the agent vested with authority to engage agents for his principal, or was it intended either that he should act in person, or should employ for himself such additional assistants as he might need?

§ 93. Same: (1) delegation of non-discretionary duties.

Where the particular act to be done is purely ministerial or non-discretionary, involving no act of deliberation or judgment, the agent may employ a deputy or assistant to perform the act; and where the general act to be done is one involving discretion, and the agent, having exercised the discretion, has still to perform in execution of his determined purpose a particular act, ministerial or non-discretionary in character, he may employ a deputy or assistant to perform such ministerial act.[1] Thus, if an agent is invested with discretion to make commercial paper, he may, after having exercised this discretion, and determined upon the making of the paper, delegate to a sub-agent the performance of the mechanical act of writing and subscribing the paper.[2] The same is true of other contracts, as insurance policies,[3] or bills of lading.[4]

§ 94. Same: (2) delegation of discretionary duties.

Some contracts are assignable, and some are non-assignable. None are assignable in which there is an element of confidence

[1] Mason *v.* Joseph, 1 Smith, 406; Rossiter *v.* Trafalgar Life Assurance Co., 27 Beav. 377; St. Margaret's Burial Board *v.* Thompson, L. R. 6 C. P. 445; Williams *v.* Woods, 16 Md. 220; Renwick *v.* Bancroft, 56 Iowa, 527; Eggleston *v.* Boardman, 37 Mich. 14.

[2] *Ex parte* Sutton, 2 Cox, 84; Commercial Bank *v.* Norton, 1 Hill (N. Y.), 501; Sayre *v.* Nichols, 7 Cal. 535.

[3] Rossiter *v.* Trafalgar Assurance Co., 27 Beav. 377; Grady *v.* American Cent. Ins. Co., 60 Mo. 116.

[4] Newell *v.* Smith, 49 Vt. 255.

or trust in the skill, credit, character, or discretion of another.[1] Agency is peculiarly a relation of trust and confidence, and hence the rule is strict that an agent cannot delegate to another the exercise of the judgment and discretion which he has undertaken personally to place at the service of his principal.[2] Accordingly an agent employed to buy or sell property for his principal cannot delegate to another the duty of buying or selling, because the principal contracts for the judgment and discretion of the agent himself.[3] Nor an attorney engaged to conduct a litigation.[4] Nor any other fiduciary.[5]

If an agent in breach of his duty to act in person commits the duty to another, he renders himself liable to his principal for all damages resulting therefrom. If, for example, he is authorized to sell goods, and turns them over instead to a sub-agent, he is guilty of conversion, and must account in full for the value of the goods.[6] And for any negligence or misconduct of a sub-agent whose appointment is not authorized by the principal, the agent remains liable.[7]

The rule, therefore, is that an agent cannot, without authority, delegate to a substitute the exercise of the judgment or discretion which he has contracted to place at the service of the principal.

To this rule, there are no real exceptions. All seeming exceptions range themselves under the head of an actual or

[1] Huffcut's Anson on Cont. p. 287 *et seq.*; Robson *v.* Drummond, 2 B. & A. 303; Arkansas Smelting Co. *v.* Belden Mining Co., 127 U. S. 379; La Rue *v.* Goezinger, 84 Cal. 281; Rochester Lantern Co. *v.* Stiles, 135 N. Y. 209.

[2] *Ante*, § 92.

[3] Coles *v.* Trecothick, 9 Ves. 234; Cockran *v.* Irlam, 2 M. & S. 301; Wright *v.* Boynton, 37 N. H. 9; Hunt *v.* Douglass, 22 Vt. 128.

[4] Eggleston *v.* Boardman, 37 Mich. 14.

[5] Howard's Case, L. R. 1 Ch. 561; *Ex parte* Birmingham Banking Co., L. R. 3 Ch. 651.

[6] Catlin *v.* Bell, 4 Camp. 183; Loomis *v.* Simpson, 13 Iowa, 532; Campbell *v.* Reeves, 3 Head (Tenn.), 226; Laverty *v.* Snethen, 68 N. Y. 522.

[7] Barnard *v.* Coffin, 141 Mass. 37; Fairchild *v.* King, 102 Cal. 320.

implied authority from the principal to the agent to employ sub-agents,[1] or under the head of a ratification or acquiescence in the employment of such sub-agents.[2] Such authority may arise from actual agreement or from usage.[3] If there be any exception it is to be sought in cases of necessity or emergency not contemplated by the parties.[4]

§ 95. Same: (3) sub-agency by authority.

Authority to employ sub-agents must be sought in the terms of the original appointment, or in the usages or customs of the particular agency, or in the obvious necessities of the case.[5] It is entirely clear that certain duties confided to an agent cannot be performed by him personally, and that he will and must employ sub-agents in order to accomplish the purposes of the agency. In such cases there is an implied authority from the principal to the agent to make use of such additional instrumentalities as may be necessary and prudent.

Assuming such authority from the principal to be expressed or implied in the terms or nature of the agency, the secondary question is whether the agent's liability is merely to use due care in the selection of the sub-agent, or whether he also remains liable for the negligence or misconduct of such sub agent. The answer hinges upon the notion of privity of contract or undertaking. Upon this, there may be two views: first, that the principal's sole contract is with the agent, but that it authorizes the agent to act through sub-agents, although remaining liable for all consequences; second, that the principal authorizes the agent to make for the principal a contract with a suitable sub-agent, and create thereby a privity of

[1] De Bussche *v.* Alt, 8 Ch. Div. 286.

[2] White *v.* Proctor, 4 Taunt. 209; Haluptzok *v.* Great Northern Ry., 55 Minn. 446.

[3] De Bussche *v.* Alt, 8 Ch. Div. 286; Laussatt *v.* Lippincott, 6 S. & R. (Pa.) 386; Harralson *v.* Stein, 50 Ala. 347; Arff *v.* Star Fire Ins. Co., 125 N. Y. 57; Carpenter *v.* German Am. Ins. Co., 135 N. Y. 298.

[4] *Ante*, § 59.

[5] De Bussche *v.* Alt, 8 Ch. Div. 286, 310.

contract between the principal and such sub-agent. Under the first view the agent alone is responsible to the principal, and the sub-agent is responsible to the agent.[1] Under the second view, the first agent discharges his obligation as soon as he appoints a suitable second agent, and the latter is responsible directly to the principal, or, in other words, the first agent is merely an agent to make contracts of employment for his principal.[2]

The problem is well illustrated in cases where A deposits in his home bank for collection commercial paper payable at a distance. In such a case A knows that the home bank must send it to a correspondent bank at the place where it is payable. The problem is whether A, under these circumstances, simply authorizes the home bank to make use of a sub-agent in the collection of the paper, or whether he authorizes the home bank to employ an additional agent in his behalf. If the first, then the home bank is liable for the manner in which the sub-agent performs the duty, and the sub-agent is liable to the home bank; if the second, then the correspondent bank is liable to the principal, and the home bank is exonerated if it has used due care in the selection of the additional agent. The courts differ widely in the view taken of this situation. One class of cases holds that A contracts for the skill and judgment of the home bank in the collection of the paper, leaving the bank free to employ such instrumentalities as it sees fit, but assuming himself no responsibility for the conduct of the sub-agents.[3] Another class of cases holds that A under such circumstances contemplates the appointment of a sub-agent, and impliedly authorizes the home bank to make such an appointment in his behalf; that the obligation of the home bank is to use due care in making such appointment; and that there arise two contracts, (1) the contract of the first bank with A to use due

[1] New Zealand, &c. Co. *v.* Watson, L. R. 7 Q. B. D. 374.

[2] De Bussche *v.* Alt, 8 Ch. Div. 286.

[3] Exchange N. B. *v.* Third N. B., 112 U. S. 276; Simpson *v.* Waldby, 63 Mich. 439; Power *v.* First N. B., 6 Mont. 251; Allen *v.* Merchants' Bank, 22 Wend. (N. Y.) 215.

care in selecting a sub-agent, and (2) the contract of the second bank with A to use due care in the collection of the paper.[1] On the first view there is no privity of contract between A and the correspondent bank, while on the second there is such privity. The same question arises in the case of the appointment of a notary by the bank;[2] and in other like cases.[3]

It will be observed that the question in these cases is not as to the power of the home bank to appoint a sub-agent, but as to the power of the home bank to create a contract between the principal and a third party. It is not the delegation of power but the possession of power that is involved. And it is believed that this is the question in every case where it is sought to establish a privity of contract between the principal and a so-called sub-agent.[4] Unhappily the courts are not agreed upon the legal effect to be given to the same set of circumstances, and therefore no definite rule can be laid down as to when the exercise of the authority to act through sub-agents does or does not create a privity between the principal and such sub-agents.

§ 96. Del credere agents.

A *del credere* agent is one who, in consideration of an additional compensation, undertakes to guarantee the payment to the principal of the debts arising and becoming due through

[1] Guelich *v.* National State Bank, 56 Iowa, 434; Dorchester Bk. *v.* New England Bk., 1 Cush. (Mass.) 177; Merchants' N. B. *v.* Goodman, 109 Pa. St. 422; Daly *v.* Bank, 56 Mo. 94; First N. B. *v.* Sprague, 34 Neb. 318; Irwin *v.* Reeves Pulley Co., 20 Ind. App. 101, 43 N. E. 601.

[2] Ayrault *v.* Pacific Bank, 47 N. Y. 570; Bank *v.* Butler, 41 Oh. St. 519.

[3] Dun *v.* City N. B., 58 Fed. Rep. 174, where it was held that one who seeks through a commercial agency information as to the standing of a person residing in a distant city, contemplates the employment of a sub-agent at the place where the third person lives and becomes the principal of such sub-agent, to whom, and not to the commercial agency, he must look for damages for negligence or fraud.

[4] De Bussche *v.* Alt, 8 Ch. Div. 286; Barnard *v.* Coffin, 141 Mass. 37; Bradstreet *v.* Everson, 72 Pa. St. 124; Cummins *v.* Heald, 24 Kans. 600.

his agency.[1] His powers and duties are, in general, of the same nature and extent as those of an ordinary agent or factor. The authorities do not agree, however, whether the legal effect of his special undertaking is to make him a mere surety for the vendee, or primarily liable for the proceeds of the sale.[2] In England, it has been held that he is merely a surety; that is to say, that he guarantees the solvency of the vendee, and in case of default, undertakes, himself, to pay;[3] but later cases clearly modify this.[4] In the United States, on the other hand, it is generally held, that the *del credere* agent is primarily liable for the proceeds of the goods sold, as for goods sold to him.[5] The question becomes of importance, under the provisions of the Statute of Frauds. If the *del credere* agent be regarded as a mere surety, his contract is to answer for the debt of another, and must therefore be in writing. But if he is himself absolutely liable in the first instance, his undertaking is an original one, and not within the provisions of the statute.[6] So, too, if he agrees to make advances to his principal, and after making them seeks to prove against the principal's bankrupt estate, it is held that he must first exhaust the property in his hands, and prove only for a balance.[7]

It is sometimes difficult to determine whether a transaction amounts to a sale between A and B or the creation of a *del credere* agency. It is stated broadly that "the law implies a mere consignment of goods for sale upon a *del credere* commission, and not a sale thereof, where the contract provides that the consignee shall receive them, and return periodically

[1] Morris *v.* Cleasby, 4 M. & S. 566; Hornby *v.* Lacy, 6 M. & S. 166.

[2] Lewis *v.* Brehme, 33 Md. 412.

[3] Morris *v.* Cleasby, 4 M. & S. 566; Hornby *v.* Lacy, 6 M. & S. 166.

[4] Couturier *v.* Hastie, 8 Ex. 40; Wickham *v.* Wickham, 2 Kay & Johns. 478.

[5] Lewis *v.* Brehme, 33 Md. 412; Sherwood *v.* Stone, 14 N. Y. 267; Swan *v.* Nesmith, 7 Pick. (Mass.) 220; Wolff *v.* Koppel, 5 Hill (N. Y.), 458.

[6] Sherwood *v.* Stone, *supra;* Swan *v.* Nesmith, *supra.*

[7] Gihon *v.* Stanton, 9 N. Y. 476; Balderston *v.* Rubber Co., 18 R. I 338. Compare Dolan *v.* Thompson, 126 Mass. 183.

to the consignor the proceeds of the sales, at prices charged by the latter, the consignee guarantying payment thereof." [1]

2. *Gratuitous Agents.*

§ 97. Obligations of gratuitous agents.

The agent may undertake to perform a service for the principal gratuitously. In such case the promise, being without consideration, is unenforceable, and the agent is not liable for refusing or neglecting to perform.[2] But if the agent enter upon the performance of the undertaking he is bound to exercise that degree of care and skill for which he undertakes. The real question in such cases is, what amount of care did the gratuitous agent undertake to bestow in the transaction committed to him? To this various answers have been returned. Some say that he undertakes to use only slight care and is therefore liable only for gross negligence.[3] Others say that he undertakes for as much care as he would bestow upon his own affairs.[4] Still others add, that he must exercise such skill as he possesses;[5] or, in case he holds himself out as skilful in a particular calling, then such as might be reasonably expected from one so holding himself out;[6] or, in case he undertakes an act highly dangerous to human life and

[1] National Cordage Co. *v.* Sims, 44 Neb. 148; *ante*, § 2.

[2] Thorne *v.* Deas, 4 Johns. (N. Y.) 84, where the subject is exhaustively discussed.

[3] Coggs *v.* Bernard, 2 Ld. Raym. 909, which, although a case of gratuitous bailment, is the fountain source of the doctrine of gratuitous undertakings generally. See also Beardslee *v.* Richardson, 11 Wend. (N. Y.) 25; Lampley *v.* Scott, 24 Miss. 528; Eddy *v.* Livingston, 35 Mo. 487.

[4] Shiells *v.* Blackburne, 1 H. Bl. 159; Moffatt *v.* Bateman, L. R. 3 P. C. 115.

[5] Wilson *v.* Brett, 11 M. & W. 113.

[6] Whitehead *v.* Greetham, 2 Bing. 464; Beal *v.* South Devon Ry., 3 H. & C. 337; Durnford *v.* Patterson, 7 Martin (La.), 460; Gill *v.* Middleton, 105 Mass. 477; McNevins *v.* Lowe, 40 Ill. 209; Isham *v.* Post, 141 N. Y. 100, where it was held that a banker undertaking to loan money gratuitously was bound "to exercise the skill and knowledge of a banker engaged in loaning money for himself and for his customers."

safety, then such care and skill as is proportioned to the risk,[1] or, in case he expressly undertakes to do a certain thing, and intentionally does the contrary, he is liable irrespective of any question of care or negligence.[2]

Probably the use of the fluid terms "slight care" and "gross negligence" has led the courts to attempt to qualify them by the addition of the more specific rules given above, and therefore not one alone, but all of the above rules together, must be accepted as containing the established doctrines upon this subject. Reduced to equivalent terms they seem to mean that a gratuitous agent must use as much care as he undertook to use, and, in deciding how much he undertook to use, the court or jury may consider: (1) how much he is accustomed to use in his own like affairs; (2) how much skill he actually possesses; (3) how much skill he holds himself out as possessing; (4) how hazardous the affair is in which he undertakes to act; (5) whether he has committed a breach of the terms of his undertaking.[3] In short the gratuitous agent must observe the rules of obedience and good faith and must exercise such prudence, skill, and care as he has, under the circumstances, expressly or impliedly undertaken to use.[4] "Gross negligence in such cases is nothing more than a failure to bestow the care which the property in its situation demands; the omission of the reasonable care required is the negligence which creates the liability; and whether this existed is a question of fact for the jury to determine, or by the court where a jury is waived."[5]

It is clear, then, that an agent's liability for negligence does not depend upon the reward he is to receive, nor is the care he is required to use proportioned to the reward. The absence of a reward has merely an evidential force in establishing the nature and extent of the care which he is bound to use, and

[1] Philadelphia & Reading R. *v.* Derby, 14 How. (U. S.) 468.

[2] Jenkins *v.* Bacon, 111 Mass. 373; Opie *v.* Serrill, 6 W. & S. (Pa.) 264.

[3] Cases *supra;* Beale, 5 Harv. Law Rev. 222.

[4] Colyar *v.* Taylor, 1 Cold. (Tenn.) 372.

[5] Mr. Justice Field in Preston *v.* Prather, 137 U. S. 604, 608–609.

even for this purpose it is of slight significance when the subsidiary rules given above come to be applied.

§ 98. Gratuitous bank directors.

The question of gratuitous agency arises frequently in the case of directors of corporations who serve without compensation, and the discussion has revolved particularly around the question as to the liability of bank directors for losses occasioned through their alleged negligence. What amount of care is a bank director, serving without compensation, required to exercise in the management of the affairs of the bank? Several answers have been given to this question. A very common answer is that he is liable only for fraud or gross negligence amounting to fraud.[1] Another answer is that he is liable for the want of that care and prudence "that men prompted by self-interest generally exercise in their own affairs."[2] A third answer is that he is liable for negligence (without an epithet) and that negligence consists in the want of care according to the circumstances; that the circumstances do not warrant a director in being judged by the standard of the man who is conducting his own business, but by the standard of the ordinarily prudent bank director as that is fixed by experience and usage.[3] The last answer seems the most reasonable, and even in the cases in which "gross" negligence is made the measure of liability, the reasoning results in the adoption of this standard.[4] The question sometimes

[1] Swentzel *v.* Penn Bank, 147 Pa. St. 140; Bank *v.* Bossieux, 4 Hughes (U. S. C. C.), 387, 398, 3 Fed. R. 817.

[2] Hun *v.* Cary, 82 N. Y. 65.

[3] Briggs *v.* Spaulding, 141 U. S. 132 (*semble*); Delano *v.* Case, 121 Ill. 247; Williams *v.* McKay, 40 N. J. Eq. 189.

[4] See Swentzel *v.* Penn Bank, *supra*, where the court says that the care to be exercised is "ordinary care." "Not, however, the ordinary care which a man takes of his own business, but the ordinary care of a bank director in the business of a bank. Negligence is the want of care according to the circumstances, and the circumstances are everything in considering this question. The ordinary care of a business man in his own affairs means one thing; the ordinary care of a gratuitous mandatory is quite another matter. The one implies an oversight and knowledge of every detail of his business; the other suggests such care only as

turns on whether the duty of the directors is to the stockholders or to the depositors, it being urged that as to the former they are agents, while as to the latter they are trustees;[1] but in either case the care required is the care customarily given by such gratuitous agents, that is, the care that an ordinarily prudent business man would understand that he had undertaken to exercise under similar circumstances.

a man can give in a short space of time to the business of other persons, from whom he receives no compensation." Yet after this excellent statement the court holds "the rule to be that directors, who are gratuitous mandatories, are only liable for fraud, or for such gross negligence as amounts to fraud!"

[1] Hun *v.* Cary, 82 N. Y. 65; Williams *v.* McKay, 40 N. J. Eq. 189.

PART III.

LEGAL EFFECT OF THE RELATION AS BETWEEN THE PRINCIPAL AND THIRD PARTIES.

§ 99. Introduction.

We have now considered, (1) the manner in which the relation of principal and agent may be formed, and (2) the legal effect of the formation of the relation as between the principal and agent. We have now to consider, (3) the legal effect of the execution of the agency as between the principal and third persons with whom the agent may deal. The main object of agency is to bring the principal into contractual relations with third persons. In executing the agency the agent may disclose his principal or he may not; he may make admissions or declarations affecting the principal's interests; he may receive notice of facts affecting the principal's interests; or he may be guilty of fraud or other torts affecting such interests. Accordingly we have now to consider each of these possible cases, and to determine the legal consequences of each. We have, in addition, to consider the liabilities of the third person to the principal.

CHAPTER IX.

CONTRACT OF AGENT IN BEHALF OF A DISCLOSED PRINCIPAL.

1. *In Agencies generally.*

§ 100. General considerations.

The normal case of agency is that in which the agent acts for a disclosed principal, in whose name, and in whose behalf he enters into contracts with third persons. In so doing the agent may (1) act within the scope of his actual authority, or (2) act outside of the scope of his actual, but within the scope of his apparent or ostensible authority, or (3) act outside of the scope of his actual or his ostensible authority. The legal effect of the contract will vary in accordance with the variance in these three particulars.

Briefly stated, the doctrine is that the principal is liable upon all contracts made by his agent within the scope of the actual authority; and upon all contracts made by his agent within the scope of the ostensible or apparent authority,[1] unless the third person has notice that the agent is exceeding his authority.[2] But the principal is not liable upon contracts made by his agent beyond the scope of the actual or the ostensible authority.[3]

[1] Trickett *v.* Tomlinson, 13 C. B. N. s. 663; Whitehead *v.* Tuckett, 15 East, 400; Fenn *v.* Harrison, 4 T. R. 177; Huntley *v.* Mathias, 90 N. C. 101; Bentley *v.* Doggett, 51 Wis. 224; Johnston *v.* Milwaukee, &c. Co., 46 Neb. 480.

[2] Jordan *v.* Norton, 4 M. & W. 155; Collen *v.* Gardner, 21 Beav. 540; Strauss *v.* Francis, L. R. 1 Q. B. 379; Rust *v.* Eaton, 24 Fed. R. 830.

[3] Stubbing *v.* Heintz, 1 Peake, 66; Fenn *v.* Harrison, 3 T. R. 757; Batty *v.* Carswell, 2 Johns. (N. Y.) 48; Martin *v.* Great Falls Mfg. Co., 9 N. H. 51; Graves *v.* Horton, 38 Minn. 66.

§ 101. Contracts actually authorized.

It is obvious that if the principal has actually authorized the contract specifically or generally, that he will be bound by it in the same manner as if he had made it in person.[1] The agent in such a case is merely an instrumentality which correctly manifests the will of the principal. This is the object of the agency and the object is attained. Every consideration that leads to the enforcement of contracts made in person calls equally for the enforcement of the contract made under these circumstances. It is immaterial by what means the agent derives his authority so long as it is sufficient. It may spring from the consent of the principal or from the necessities of the situation.[2]

§ 102. Contracts apparently authorized: estoppel.

It may happen, however, that the principal has authorized his agent to make a contract or to make contracts, but has placed certain restrictions or limitations upon the agent as to the terms of the transaction. These restrictions the agent may disregard. In such a case the will of the principal is not correctly manifested. Is he nevertheless bound by the contract?

The solution of this problem depends upon a consideration much more vital than the interests or rights of the principal. It depends upon a consideration of the rights of the public generally, and of those persons specially who may deal with the agent. If agency is to be admitted as a means of transacting business, it is essential that the business world should be able to deal with agents, in a reasonable and prudent manner, without assuming the risk that the agent may turn out in the end to have exceeded his actual authority. This consideration leads to the conclusion that where a principal has vested his agent with apparent authority to make a certain contract, and the agent, acting within

[1] If the principal could not lawfully have made the contract, of course the agent cannot do so in his behalf. Montreal Assurance Co. *v.* M'Gillivray, 13 Moo. P. C. C. 87.

[2] See Chapters II. and V., *ante*.

the scope of such apparent authority, does make a contract with a person who reasonably believes the agent to possess the authority which he seems to possess, the principal is bound by such contract, even though the agent's authority was in fact limited in such a way that the contract was wholly unauthorized.[1] The sole inquiry in such a case is whether there has been a holding out of the agent as one having authority and whether the third person, acting with average prudence and good faith, was justified in believing that the agent possessed the necessary authority.[2] If so, the principal must bear the risk, because he has held out the agent as possessing the authority which he seems to possess, and is not in a position to maintain that third parties should know that what appears to be true is not true. It will be observed that this conclusion is based upon those doctrines of estoppel considered in a previous chapter.[3]

§ 103. Ostensible authority. — Meaning.

Ostensible or apparent authority vested in an agent may, when exercised, have the same effect in imposing contractual obligations upon his principal as actual authority. The doctrine has been clearly and satisfactorily stated in these words:

"Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform on behalf of his principal a particular act, such particular act having been performed, the principal is estopped, as against such innocent third person, from denying the agent's authority to perform it."[4]

In order to establish the apparent or ostensible authority of the agent, therefore, it is necessary to show: (1) that the

[1] Nickson *v.* Brohan, 10 Mod. 109; Butler *v.* Maples, 9 Wall. (U. S.) 766; Johnson *v.* Hurley, 115 Mo. 513.

[2] Spooner *v.* Browning, 1898, 1 Q. B. 528.

[3] *Ante*, §§ 5, 51, 52.

[4] Irvine, C., in Johnston *v.* Milwaukee & Wyoming Investment Co., 46 Neb. 480, 490. See also Pole *v.* Leask, 33 L. J. Ch. 162.

principal held out the agent under circumstances from which a reasonably prudent man might infer such authority; (2) that, acting prudently, and in good faith, X believed the agent to possess such authority.

(1) *Holding out.* One who holds out another as his agent cannot deny the agency, or the authority that reasonably attaches to it, as against one who prudently acts upon such ostensible authority.[1] What constitutes such a "holding out" as will work an estoppel in favor of innocent parties is a question of fact. It is sometimes said that where the facts are undisputed the question of authority is one of law for the court;[2] but, in accordance with the general principles applicable to similar questions, it would seem that this question is for the court when the facts are undisputed, and but one inference can reasonably be drawn from the facts,[3] but that if the facts are in dispute, or if reasonable men might differ as to the inferences to be drawn from the facts, the doubt should be resolved by the jury.[4] If the authority be contained in a writing upon which X relied, or ought to have relied, its interpretation is for the court in accordance with the general rules governing written instruments.[5] An ambiguous authority is construed to cover any act that may fall within any fair interpretation of it.[6]

The apparent scope of an agent's authority is such authority as a reasonably prudent man, in like circumstances with X and with like means of knowledge and information, would naturally infer the agent to possess. The cases are numerous and decisive to the point, that the third person may prudently conclude that the principal intends the agent to exercise those

[1] Pickering *v.* Busk, 15 East, 38; Rimell *v.* Sampayo, 1 C. & P. 254; Jetley *v.* Hill, 1 C. & E. 239; Daylight Burner Co. *v.* Odlin, 51 N. H. 56; Johnson *v.* Hurley, 115 Mo. 513.

[2] Gulick *v.* Grover, 33 N. J. L. 463.

[3] Spooner *v.* Browning, 1898, 1 Q. B. 528; Franklin Bank Note Co. *v.* Mackey, 158 N. Y. 140.

[4] Seiple *v.* Irwin, 30 Pa. St. 513; Huntley *v.* Mathias, 90 N. C. 101.

[5] Savings Fund Soc. *v.* Savings Bank, 36 Pa. St. 498.

[6] Ireland *v.* Livingston, L. R. 5 H. L. 395; Very *v.* Levy, 13 How. (U. S.) 345.

powers which ordinarily and properly belong to the character in which the principal holds the agent out to the world. "When a general agent transacts the business entrusted to him, within the usual and ordinary scope of such business, he acts within the extent of his authority; and the principal is bound, provided the party dealing with the agent acts in good faith, and is not guilty of negligence which proximately contributes to the loss." [1]

(2) *Relying upon representation.* In order to work an estoppel against the principal based upon a holding out of the agent as possessed of authority, it is necessary that the third person should have relied in good faith and prudently upon the appearance of authority thus created.[2] Thus if a principal permits an agent who has loaned money for him to retain the bond and mortgage, he vests the agent with apparent authority to receive payment, and any payment made by the mortgagor relying upon the appearance of authority thus created will bind the principal; but if the mortgagor makes a payment to the agent after the latter has parted with possession of the documents, with or without the knowledge of his principal, such payment will not bind the principal, because the mortgagor is not then relying upon an existing appearance of authority.[3] In any case where the third person may not prudently infer that the agent possesses the powers exercised, he is negligent, and it is his own negligence, and not the conduct of the principal, that is the proximate cause of his loss.[4] If the third person knows the limitation upon the agent's authority, he does not in good faith rely upon any apparent authority, and cannot hold the principal.[5] But he

[1] Wheeler *v.* McGuire, 86 Ala. 402; Butler *v.* Maples, 9 Wall. (U. S.) 766; Munn *v.* Commission Co., 15 Johns. (N. Y.) 44; Hatch *v.* Taylor, 10 N. H. 538.

[2] Small *v.* Attwood, 1 Younge, 407; Freeman *v.* Cooke, 2 Ex. 654; Proctor *v.* Bennis, 36 Ch. Div. 740.

[3] Crane *v.* Gruenewald, 120 N. Y. 274.

[4] Hazeltine *v.* Miller, 44 Me. 177; Gulick *v.* Grover, 33 N. J. L. 463.

[5] Collen *v.* Gardner, 21 Beav. 540; Peabody *v.* Hoard, 46 Ill. 242.

is not bound to search for secret limitations upon an ostensible authority.[1]

§ 104. Same. — General and special agents.

It is often said that the rules as above stated apply to a general agency, but not to a special agency.[2] "The distinction is well settled between a general and a special agent. As to the former, the principal is responsible for the acts of the agent, when acting within the general scope of his authority, and the public cannot be supposed connusant of any private instructions from the principal to the agent; but where the agency is a special and temporary one, there the principal is not bound if the agent exceeds his employment."[3] "The acts of the former bind the principal, whether in accordance to his instructions or not; those of the latter do not, unless strictly within his authority."[4] "A special agent cannot bind his principal in a matter beyond or outside of the power conferred, and the party dealing with a special agent is bound to know the extent of his authority."[5] And many other cases use language to the same effect.

It is believed, however, that these statements as to the distinction between general and special agents are misleading. The difference between a general agent and a special agent is not absolute but relative. It is a difference in degree and not in kind. In either case the principal by authorizing the agent to do a particular act or class of acts vests him ostensibly with authority to do what is ordinarily incidental to the execution of the power. In either case the burden of proof is on the person dealing with the agent to show that the agent had the authority, real or ostensible, which he assumed to exercise.[6] In bearing this burden the proponent may pro-

[1] Byrne *v.* Massasoit Packing Co., 137 Mass. 313; Bentley *v.* Doggett, 51 Wis. 224. Compare Baines *v.* Ewing, 4 H. & C. 511.

[2] For definitions, see *ante*, § 7; Whitehead *v.* Tuckett, 15 East, 408; Fenn *v.* Harrison, 3 T. R. 762.

[3] Munn *v.* Commission Co., 15 Johns. (N. Y.) 44, 54.

[4] Rossiter *v.* Rossiter, 8 Wend. (N. Y.) 497.

[5] Blackwell *v.* Ketcham, 53 Ind. 186.

[6] Pole *v.* Leask, 33 L. J. N. S. Ch. 155.

ceed more easily in the case of an agent whose incidental powers are naturally or necessarily extensive, than in the case of one whose incidental powers are naturally or necessarily limited. But to assert that in the one case the third person need not inquire whether what appears to be true is true, while in the other he must so inquire, is to set an artificial and inconvenient limit to the operation of the salutary doctrines of estoppel. The most that can justly be asserted is that the third person should know that an agent, not acting in the ordinary course of a trade, business, or profession, and delegated to perform a single act, or even a number of disconnected particular acts, can possess but a very narrow limit of incidental authority beyond the limits of the real or actual authority. There is, therefore, little to rely upon except the actual authority. But as to that little (and it varies in degree, even as in agencies of wider scope) the third person may rely upon it as safely as upon the larger incidental powers flowing from a general agency. In neither case will any private instructions to the agent, intended to limit the ostensible authority, be effective as against one who deals with the agent in ignorance of such instructions.[1]

"Whether, therefore, an agency is general or special is wholly independent of the question whether the power to act within the scope of the authority given is unrestricted, or whether it is restrained by instructions or conditions imposed by the principal relative to the mode of its exercise."[2] "Where private instructions are given to a special agent, respecting the mode and manner of executing his agency, intended to be kept secret, and not communicated to those with whom he may deal, such instructions are not to be regarded as limitations upon his authority; and notwithstanding he disregards them, his act, if otherwise within the scope of his agency, will be valid, and bind his employer. . . .

[1] Hatch *v.* Taylor, 10 N. H. 538; Bryant *v.* Moore, 26 Me. 84; Towle *v.* Leavitt, 23 N. H. 360; Byrne *v.* Massasoit Packing Co., 137 Mass. 313; Wilson *v.* Beardsley, 20 Neb. 449. *Cf.* Baines *v.* Ewing, 4 H. & C. 511.

[2] Butler *v.* Maples, 9 Wall. (U. S.) 766, 774.

No man is at liberty to send another into the market, to buy or sell for him, as his agent, with secret instructions as to the manner in which he shall execute his agency, which are not to be communicated to those with whom he is to deal; and then, when his agent has deviated from those instructions, to say that he was a special agent — that the instructions were limitations upon his authority — and that those with whom he dealt, in the matter of his agency, acted at their peril, because they were bound to inquire, where inquiry would have been fruitless, and to ascertain that, of which they were not to have knowledge."[1] This doctrine places special agencies upon the same footing as general agencies; each is to be measured by the appearance of authority upon which reasonably prudent men may rely. "The rule is, that if a special agent exercise the power exhibited to the public the principal will be bound, even if the agent has received private instructions which limit his special authority."[2]

§ 105. Same. — Public agents.

"Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. Principals, in the latter category, are in many cases bound by the acts and declarations of their agents, even where the act or declaration was done or made without any authority, if it appear that the act was done or declaration was made by the agent in the course of his regular employment; but the government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority, or that he had been held out as having authority to do the act, or was employed in his capacity as a public agent to do the act or make the declaration for the government. . . . Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of

[1] Hatch *v.* Taylor, 10 N. H. 538, 548.

[2] Howell *v.* Graff, 25 Neb. 130; Byrne *v.* Massasoit Packing Co., 137 Mass. 313. See Ewart on Estoppel, pp. 474–483.

the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury of the public." [1]

§ 106. Same. — Elements of authority.

Several elements combine to make up what is termed the apparent scope of the agent's authority, or that appearance of authority upon which the public may rely. These are (1) the powers actually conferred; (2) the powers necessarily or reasonably incidental to those actually conferred; (3) the powers annexed by custom or usage to those actually conferred; (4) the powers which the principal has by his conduct led third persons reasonably to believe that his agent possesses.[2]

(1) *Powers actually conferred.* — The principal is, of course, bound by what he expressly authorizes. On the other hand, he is bound by no more than he actually authorizes in cases where the third party knows the exact terms of the authority. This is especially true of authority conferred in a formal power of attorney. Such powers of attorney are construed as giving only the authority actually expressed [3] and such medium powers as are necessary for the effective execution of those so expressed.[4] "It is as fundamental as it is elementary in the law of agency that a formal instrument conferring authority will be construed strictly, and can be held to include only those powers which are expressly given, and those which are necessary and essential to carry into effect those which are expressed." [5] Thus it has been held that a

[1] Whiteside *v.* United States, 93 U. S. 247, 256–257, *citing* Story on Agency, § 307 *a*; Lee *v.* Munroe, 7 Cranch (U. S.), 366; Mayor *v.* Eschbach, 18 Md. 276, 282. As to liability of public agent for his own acts, see *post*, § 203.

[2] Huntley *v.* Mathias, 90 N. C. 101.

[3] Bryant *v.* Bank, 1893, App. Cas. 170; Lewis *v.* Ramsdale, 55 L. T. R. 179; Gilbert *v.* How, 45 Minn. 121; Craighead *v.* Peterson, 72 N. Y. 279.

[4] Howard *v.* Baillie, 2 H. Bl. 618; Le Roy *v.* Beard, 8 How. (U. S.) 451; Peck *v.* Harriott, 6 S. & R. (Pa.) 146.

[5] Harris *v.* Johnston, 54 Minn. 182; Penfold *v.* Warner, 96 Mich. 179.

power of attorney to an agent to sell all lands owned by the donor of the power in a certain county would not be construed to cover lands purchased by the donor subsequent to the execution of the power.[1] But this has been criticised as too strict a construction.[2] In general the formal instrument is construed strictly as to its terms and is not to be extended to the authorization of acts beyond those specified, and to those only when done in the principal's business and for his benefit.[3] Where the instrument is capable of two interpretations, and the agent and third party deal in the light of one of them in good faith, the principal is bound even though he intended it to mean otherwise.[4] But where the power fixes a limit to the agent's transactions for his principal, and the agent represents that he has not yet exceeded the limit, it seems the principal is not responsible for the veracity and accuracy of the agent's statements.[5]

Where the authority is contained in an instrument not under seal, or is conferred orally, the authority is construed more liberally, that is, while evidence of usage or attendant circumstances may not be allowable to vary an authority under seal,[6] such evidence may be received to extend an authority not under seal.[7]

Notice of the actual limits of an agent's powers prevents the one having such notice from claiming to rely upon ostensible authority. Thus by statute a signature by "procura-

[1] Penfold *v.* Warner, *supra;* Weare *v.* Williams, 85 Iowa, 253.

[2] 35 Am. St. Rep. 593, *citing* Fay *v.* Winchester, 4 Met. (Mass.) 513; Bigelow *v.* Livingston, 28 Minn. 57.

[3] Attwood *v.* Munnings, 7 B. & C. 278; Craighead *v.* Peterson, 72 N. Y. 279; Camden, &c. Co. *v.* Abbott, 44 N. J. L. 257. But see North River Bank *v.* Aymar, 3 Hill (N. Y.), 262.

[4] Ireland *v.* Livingston, L. R. 5 H. L. 395; Minnesota, &c. Co. *v.* Montague, 65 Iowa, 67.

[5] Baines *v.* Ewing, 4 H. & C. 511; Mussey *v.* Beecher, 3 Cush. (Mass.) 511. See *post*, §§ 154–157.

[6] Hogg *v.* Snaith, 1 Taunt. 347; Delafield *v.* Illinois, 26 Wend. (N. Y.) 192. Such evidence may be used to interpret the instrument. Reese *v.* Medlock, 27 Tex. 120; Frink *v.* Roe, 70 Cal. 296.

[7] Pole *v.* Leask, 28 Beav. 562; Entwisle *v.* Dent, 1 Ex. 812; Phillips *v.* Moir, 69 Ill. 155; Lyon *v.* Pollock, 99 U. S. 668.

tion" operates as notice that the agent has but a limited authority to sign negotiable instruments, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.[1]

(2) *Powers incidental to those conferred.* — The implied authority of the agent includes the power to use all means reasonably necessary to the accomplishment of the object of the agency.[2] What means are thus reasonably necessary, seems to be a mixed question of law and fact. "Sometimes the powers are determined by mere inference of law; in other cases by matters of fact; in others by inference of fact; and in others still, to determine them becomes a question of mixed law and fact."[3] The nature and extent of such incidental powers are varied and beyond the province of this work to enumerate in detail. A few illustrations must suffice. An agent employed to travel and sell goods has the implied power to hire a horse for such purpose.[4] And the principal is liable for the horse hire even though he has furnished the agent with money to pay for it, and has forbidden the agent to hire it on credit.[5] But the manager of a hotel has no implied authority to hire horses for the use of guests and render the principal liable for their safe-keeping and return.[6] An agent authorized to sell goods has implied power to warrant the goods in such manner as is usual in such sales, but not the power to give an unusual warranty.[7] And the weight of authority is now in favor of the proposition that an agent

[1] Negotiable Instruments Law, § 21 (N. Y. § 40); English Bills of Exchange Act, § 25; Stagg *v.* Elliott, 12 C. B. N. S. 373; The Floyd Acceptances, 7 Wall. (U. S.) 666; Nixon *v.* Palmer, 8 N. Y. 398.

[2] Pole *v.* Leask, 28 Beav. 562; Beaufort *v.* Neeld, 12 C. & F. 248; Durrell *v.* Evans, 1 H. & C. 174; Mullens *v.* Miller, 22 Ch. Div. 194; Wheeler *v.* McGuire, 86 Ala. 398; Bentley *v.* Doggett, 51 Wis. 224.

[3] Huntley *v.* Mathias, 90 N. C. 101, 104.

[4] Huntley *v.* Mathias, *supra.*

[5] Bentley *v.* Doggett, *supra.*

[6] Brockway *v.* Mullin, 46 N. J. L. 448. See also Wallis Tobacco Co. *v.* Jackson, 99 Ala. 460.

[7] Benj. on Sales (Bennett's ed. 1892), § 624, and notes pp. 629-630; cases cited *post*, § 107; Upton *v.* Suffolk County Mills, 11 Cush. (Mass.) 586.

authorized to sell and convey real property may, unless specially restricted, sell and convey with general warranty.[1] An agent authorized to sell goods has implied power to receive payment for the goods provided he has possession of them, and is authorized to deliver; but if he has not possession there is no implied authority to receive payment.[2] An agent has implied power to borrow money only where the transaction of the business confided to him absolutely requires the exercise of the power in order to carry it on; it will not be implied merely because its exercise would be convenient or advantageous.[3] Some agents have, however, a customary power to borrow money, as cashiers of banks[4] and masters of ships.[5] The power to make or indorse negotiable paper will not ordinarily be inferred, or regarded as incidental to other powers.[6]

(3) *Powers annexed by custom.* Custom or usage may aid materially in determining the authority of an agent. An agent may be one who follows an established or recognized trade, profession, or business, or he may be one not following such a recognized or customary business. Where a principal appoints an agent who is customarily governed by established usages, it is presumed that he intends such usages to govern the agent in the transaction in ques-

[1] Le Roy *v.* Beard, 8 How. (U. S.) 451; Schultz *v.* Griffin, 121 N. Y. 294.

[2] Higgins *v.* Moore, 34 N. Y. 417; Butler *v.* Dorman, 68 Mo. 298; Seiple *v.* Irwin, 30 Pa. St. 513.

[3] Bickford *v.* Menier, 107 N. Y. 490; Consolidated Nat. Bk. *v.* Pacific, &c. Co., 95 Cal. 1; Heath *v.* Paul, 81 Wis. 532; Bryant *v.* Bank, 1893, App. Cas. 170.

[4] Crain *v.* First N. B., 114 Ill. 516; Barnes *v.* Ontario Bk., 19 N. Y. 152.

[5] The power of masters of ships to borrow money rests strictly on imperative necessity, which, it seems, must be shown to exist in order to charge the principal. McCready *v.* Thorn, 51 N. Y. 454; Stearns *v.* Doe, 12 Gray (Mass.), 482. *Cf.* Arey *v.* Hall, 81 Me. 17. *Post*, § 116.

[6] Abel *v.* Sutton, 3 Esp. 108; Kilgour *v.* Finlyson, 1 H. Bl. 155; Burmester *v.* Norris, 6 Ex. 796; *In re* Cunningham, 36 Ch. Div. 532; New York Iron Mine *v.* First N. B., 39 Mich. 644; Jackson *v.* Nat. Bk., 92 Tenn. 154. *Cf.* Edmunds *v.* Bushell, L. R. 1 Q. B. 97.

tion.[1] It is upon this consideration that the courts reach the conclusion that a bank cashier has power to borrow money;[2] or a factor or broker to sell on credit;[3] or an attorney to control the procedure of an action at law.[4] Where the principal appoints an agent who does not follow a customary calling, such agent, in the carrying out of the objects of the agency, has implied authority to deal according to the usages of the particular business confided to him, or of the particular place in which the business is to be done.[5] This doctrine as to custom is well illustrated in the case of stock-brokers who buy and sell stock on margins, or otherwise, in behalf of customers. The customer is bound by the customs of the market in which he deals, and if the custom permits the broker to repledge the stock for his own debt, the principal will be bound by the custom.[6] The doctrine finds a further illustration in the much mooted question as to the power of an agent to warrant goods sold for his principal.[7] The usage must be reasonable, not contrary to positive law, well-established, and publicly known;[8] or if it be not general it must be known to the principal.[9] Even when a usage fulfils all necessary conditions it will not prevail as against positive instructions given to the agent.[10] It is nec-

[1] Young *v.* Cole, 3 Bing. N. C. 724; Howard *v.* Sheward, L. R. 2 C. P. 148; Hibbard *v.* Peek, 75 Wis. 619; Adams *v.* Ins. Co., 95 Pa. St. 348.

[2] Crain *v.* First N. B., 114 Ill. 516.

[3] Boorman *v.* Brown, 3 Q. B. 511; Pinkham *v.* Crocker, 77 Me. 563; Daylight Burner Co. *v.* Odlin, 51 N. H. 56.

[4] Strauss *v.* Francis, L. R. 1 Q. B. 379; Moulton *v.* Bowker, 115 Mass. 36.

[5] Dingle *v.* Hare, 7 C. B. N. S. 145; Pelham *v.* Hilder, 1 Y. & Coll. C. C. 3; Pollock *v.* Stables, 12 Q. B. 765; Pickert *v.* Marston, 68 Wis. 465.

[6] Skiff *v.* Stoddard, 63 Conn. 198.

[7] *Post.* § 107; Brady *v.* Todd, 9 C. B. N. S. 592; Howard *v.* Sheward, L. R. 2 C. P. 148; Brooks *v.* Hassall, 49 L. T. R. 569.

[8] Sweeting *v.* Pearce, 7 C. B. N. S. 449; United States *v.* Buchanan, 8 How. (U. S.) 83; Jackson *v.* Bank, 92 Tenn. 154; Hibbard *v.* Peek, 75 Wis. 619.

[9] Walls *v.* Bailey, 49 N. Y. 464; Robinson *v.* Mollett, L. R. 7 H. L. 802.

[10] Day *v.* Holmes, 103 Mass. 306.

essary in all cases to distinguish between regulations or customs intended to govern a particular body of dealers (as stock-brokers) in their relations to each other, and regulations or customs intended to bind outsiders. An outsider is bound only so far as the rules or customs are clearly intended to apply to outsiders.[1] In some cases the court will take judicial notice of the existence of the custom,[2] but generally it is a matter of proof. If sought to be established by proof, it must be shown to be so prevailing that parties may be presumed to contract with reference to it.[3]

(4) *Powers inferred from conduct of principal.* The conduct of the principal may be such as to lead to a reasonable inference that the agent has certain powers, and if so the principal will be estopped to deny the existence of such powers. "If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he, with such belief, does act in that way to his damage, the first is estopped from denying that the facts were as represented."[4] The doctrine is the general doctrine of estoppel and calls for no special consideration in this place.[5]

§ 107. Apparent scope of authority. — Illustrations.

(1) *Agent authorized to sell.* An agent authorized to sell possesses impliedly or by custom the following authority: (*a*) to receive payment if the agent has possession of the goods but not otherwise;[6] (*b*) to fix the terms of the sale

[1] Levitt *v.* Hamblet, 1901, 1 K. B. 53.

[2] Ahern *v.* Goodspeed, 72 N. Y. 108; Talmage *v.* Bierhause, 103 Ind. 270.

[3] Herring *v.* Skaggs, 62 Ala. 180, s. c. 73 Ala. 446.

[4] Carr *v.* Ry. Co., L. R. 10 C. P. 307, 317; Austrian *v.* Springer, 94 Mich. 343.

[5] See *ante*, §§ 51, 52, 103; Smith *v.* Clews, 105 N. Y. 283; Levi *v.* Booth, 58 Md. 305; Johnson *v.* Hurley, 115 Mo. 513; Smith *v.* McGuire, 3 H. & N. 554.

[6] Higgins *v.* Moore, 34 N. Y. 417; Butler *v.* Dorman, 68 Mo. 298.

so far as reasonably within the customs of such agencies and sales;[1] (*c*) to warrant the quality of the goods sold if such goods are customarily sold with such a warranty by agents of like kind,[2] but not if the article be not usually sold with a warranty,[3] or with a warranty like the one in question,[4] or if the agent be one not usually authorized to warrant.[5] He has no implied authority to sell at auction;[6] to exchange the goods by way of barter with a third person;[7] to sell on credit[8] unless clearly justified by custom, as in the case of factors; to pledge or mortgage the goods;[9] or, after a sale is once made, to rescind the contract or modify its terms.[10] These rules apply, in the main, to agents authorized to sell realty as well as to those authorized to sell personalty.[11]

(2) *Agent authorized to purchase.* An authority to purchase is construed somewhat more strictly than an authority to sell. Except where "it is the custom of the trade to buy

Law *v.* Stokes, 32 N. J. L. 249. Payment must be in money, not in checks or other negotiable instruments. Harlan *v.* Ely, 68 Cal. 522; Brown *v.* Smith, 67 N. C. 245; Buckwalter *v.* Craig, 55 Mo. 71.

[1] Putnam *v.* French, 53 Vt. 402; Daylight Burner Co. *v.* Odlin, 51 N. H. 56.

[2] Dingle *v.* Hare, 7 C. B. N. S. 145; Ahern *v.* Goodspeed, 72 N. Y. 108; Pickert *v.* Marston, 68 Wis. 465.

[3] Smith *v.* Tracy, 36 N. Y. 79; Argersinger *v.* Macnaughton, 114 N. Y. 535; Herring *v.* Skaggs, 62 Ala. 180, s. c. 73 Ala. 446.

[4] Wait *v.* Borne, 123 N. Y. 592; Upton *v.* Suffolk County Mills, 11 Cush. (Mass.) 586; Palmer *v.* Hatch, 46 Mo. 585; Brady *v.* Todd, 9 C. B. N. S. 592.

[5] Payne *v.* Leconfield, 51 L. J. Q. B. 642; Cooley *v.* Perrine, 41 N. J. L. 322, s. c. 42 N. J. L. 623; Dodd *v.* Farlow, 11 Allen (Mass.), 426.

[6] Towle *v.* Leavitt, 23 N. H. 360.

[7] Taylor *v.* Starkey, 59 N. H. 142; Guerreiro *v.* Peile, 3 B. & A. 616.

[8] Wiltshire *v.* Sims, 1 Camp. 258; Payne *v.* Potter, 9 Iowa, 549.

[9] Wheeler, &c. Co. *v.* Givan, 65 Mo. 89; Warner *v.* Martin, 11 How. (U. S.) 209; Frink *v.* Roe, 70 Cal. 296; Rodick *v.* Coburn, 68 Me. 170. For statutory provisions under Factors' Acts, see *post*, § 171.

[10] Nelson *v.* Aldridge, 2 Stark. 435; Diversy *v.* Kellogg, 44 Ill. 114; Smith *v.* Rice, 1 Bailey (S. C.), 648; *cf.* Young *v.* Cole, 3 Bing. N. C. 724.

[11] Le Roy *v.* Beard, 8 How. (U. S.) 451; Schultz *v.* Griffin, 121 N. Y. 294; Peters *v.* Farnsworth, 15 Vt. 155.

on credit," "the law does not raise any presumption that such agent may bind his principal by a purchase on credit, but the contrary."[1] This, of course, where the agent is supplied with funds; if he be not supplied with funds, the direction to buy will imply the authority to buy on credit.[2] He can buy neither more, nor less, nor any different kind of goods, than his instructions specify,[3] or than third persons may reasonably infer that he has authority to contract for.[4] He may be presumed to have such powers as are reasonably incidental to the transaction, as, to fix the terms, and, if authorized to purchase on credit, to make the necessary representations as to the solvency of the principal.[5]

(3) *Agent authorized to manage a business.* Where an entire business is placed under the management of an agent, the authority of the agent may be presumed to be commensurate with the necessities of his situation.[6] He is to conduct the business as it is, buying and selling, hiring workmen or agents, and otherwise acting as a prudent man would in the conduct of a like enterprise. He has implied authority to do whatever is ordinarily incidental to the conduct of such a business, whatever is necessary to the effective execution of his duties, or whatever is customary in a particular trade.[7] For all contracts made within these limits the principal is liable; but not for contracts outside of these limits. Thus the manager of a hotel may bind his principal for the necessary supplies of the house,[8] but not

[1] Komorowski *v.* Krumdick, 56 Wis. 23; Wheeler *v.* McGuire, 86 Ala. 398; Berry *v.* Barnes, 23 Ark. 411.

[2] Sprague *v.* Gillett, 9 Met. (Mass.) 91.

[3] Olyphant *v.* McNair, 41 Barb. (N. Y.) 446.

[4] Butler *v.* Maples, 9 Wall. (U. S.) 766.

[5] Bayley *v.* Wilkins, 7 C. B. 886; Wishard *v.* McNeill, 85 Iowa, 474; Watteau *v.* Fenwick, 1893, 1 Q. B. 346; Hubbard *v.* Tenbrook, 124 Pa. St. 291.

[6] Quoted with approval in Lowenstein *v.* Lombard, 164 N. Y. 324, 329.

[7] Edmunds *v.* Bushell, L. R. 1 Q. B. 97; Jones *v.* Phipps, L. R. 3 Q. B. 567; Collins *v.* Cooper, 65 Tex. 460; German Fire Ins. Co. *v.* Grunett, 112 Ill. 68.

[8] Beecher *v.* Venn, 35 Mich. 466.

for those that are not shown to be necessary.[1] A manager of a shop has authority to buy the goods necessary to keep it in running order.[2] But there is ordinarily no implied authority to make negotiable paper;[3] nor to borrow money except where the power is absolutely indispensable;[4] nor to sell the entire business,[5] nor to pledge or mortgage it,[6] nor to use his principal's goods for payment of his own debts.[7]

(4) *Insurance agents.* An insurance agent, whether called "general" or "local," — that is, whether his authority is exercised over a wide or a narrow territory, — is, within such prescribed territory, the general representative of his company, and the law applicable to him is, broadly speaking, the same as that applicable to a general agent.[8] If authorized to solicit and accept risks, or issue and renew policies, he is a general agent, and has ostensibly all the powers incidental to such an agency or customary in it.[9] Within the scope of such ostensible authority, the agent may bind his principal, although he acts contrary to special instructions.[10] Third persons are not affected in their dealings

[1] Wallis Tobacco Co. *v.* Jackson, 99 Ala. 460; Brockway *v.* Mullin, 43 N. J. L. 448; *cf.* Cummings *v.* Sargent, 9 Met. (Mass.) 172.

[2] Wareau *v.* Fenwick, *supra;* Hubbard *v.* Tenbrook, *supra;* Banner Tobacco Co. *v.* Jenison, 48 Mich. 459.

[3] McCullough *v.* Moss, 5 Denio (N. Y.), 567; New York Iron Mine *v.* First N. Bank, 39 Mich. 644; Temple *v.* Pomroy, 4 Gray (Mass.), 128; *cf.* Edmunds *v.* Bushell, L. R. 1 Q. B. 97.

[4] Hawtayne *v.* Bourne, 7 M. & W. 595; Bickford *v.* Menier, 107 N. Y. 490; Perkins *v.* Boothby, 71 Me. 91.

[5] Vescelius *v.* Martin, 11 Colo. 391; Claflin *v.* Cont. Jersey Works, 85 Ga. 27.

[6] Despatch Line *v.* Mfg. Co., 12 N. H. 205.

[7] Stewart *v.* Woodward, 50 Vt. 78.

[8] Millville, &c. Ins. Co. *v.* Mechanics', &c. Ass'n, 43 N. J. L. 652; Mentz *v.* Lancaster F. Ins. Co., 79 Pa. St. 475.

[9] Pitney *v.* Glen's Falls Ins. Co., 65 N. Y. 6; Continental Ins. Co. *v.* Rockmar., 127 Ill. 364; Miller *v.* Phœnix Ins. Co., 27 Iowa, 203; South Bend, &c. Co *v.* Dakota, &c. Ins. Co., 2 S. Dak. 17; Phœnix Ins. Co. *v.* Munger, 49 Kans. 178.

[10] Ruggles *v.* American Central Ins. Co., 114 N. Y. 415; Forward *v.* Cont. Ins. Co., 142 N. Y. 382; Machine Co. *v.* Insurance Co., 50 Oh. St 549; Viele *v.* Germania Ins. Co., 26 Iowa, 9.

with an insurance agent within his ostensible authority by secret or private instructions not brought to their attention.[1] But if the third party knows of the limitations set by the principal upon the agent's authority, a contract beyond those limits would not be binding upon the principal.[2] Whether restrictions contained in a policy operate as notice to the insured of the limitations upon the agent's authority, there is a conflict of judicial decisions. As to acts by the agent subsequent to the issuing of the policy, the restrictions in the policy are clearly binding and effective notice.[3] But as to acts prior to or contemporaneous with the issuing of the policy, it has been held that the restrictions in the policy are not binding and effective unless actually known to the insured, since the latter cannot be held to anticipate that such restrictions will appear in the policy when delivered.[4] An agent to receive applications and premiums, and countersign and deliver policies, has no implied authority to receive notice of loss or to adjust losses.[5] The questions connected with insurance are, however, so numerous, and the authorities so conflicting, that the student must be referred to special works upon that subject.[6]

(5) *Agent authorized to collect.* An agent may be expressly authorized to collect money for his principal, and such authority may be implied from circumstances. Such authority is not necessarily implied from the mere fact that

[1] Union Mut. Ins. Co. *v.* Wilkinson, 13 Wall. (U. S.) 222; Commercial, &c. Ins. Co. *v.* State, 113 Ind. 331; Hartford Ins. Co. *v.* Farrish, 73 Ill. 166.

[2] Baines *v.* Ewing, L. R. 1 Ex. 320; 4 H. & C. 511; Armstrong *v.* State Ins. Co., 61 Iowa, 212; Fleming *v.* Hartford F. Ins. Co., 42 Wis. 616.

[3] Quinlan *v.* Providence, &c. Co., 133 N. Y. 356; Haukins *v.* Rockford Ins. Co., 70 Wis. 1; Burlington Ins. Co. *v.* Gibbons, 43 Kans. 15.

[4] Continental Ins. Co. *v.* Ruckman, 127 Ill. 364; Tubbs *v.* Dwelling House Ins. Co., 84 Mich. 646; Kausal *v.* Minnesota, &c. Ins. Co , 31 Minn. 17; Mutual B. L. Ins. Co. *v.* Robison, 58 Fed. Rep. 723. See, for authorities *pro* and *con*, Joyce on Ins. §§ 434–439.

[5] Ermentrout *v.* Girard, &c. Ins. Co., 63 Minn. 305. But see Joyce on Ins. § 575 *et seq.*

[6] May on Ins. §§ 118–155; 1 Joyce on Ins. §§ 386–603.

the agent is authorized to present the bill or claim to the third party,[1] but it may be implied from such fact and its surrounding circumstances.[2] Nor is such authority to be implied from the mere fact that the agent negotiated the contract out of which the claim arose;[3] but where the agent sells and delivers property there is an implied authority to collect payment.[4] Authority to collect may be implied from the conduct of the principal in holding out his agent as having such authority.[5] Where the agent is entrusted with securities received by him upon the negotiation of a loan, it is implied that he is authorized to receive the payments due upon such securities.[6] But if the agent has not possession of the securities, no authority to receive payment upon them can be implied.[7] Authority to receive interest does not necessarily carry with it authority to receive the principal sum.[8]

An agent authorized to receive payment is not impliedly authorized to receive anything but money.[9] He cannot bind his principal by accepting a promissory note,[10] check,[11]

[1] Hirshfield *v.* Waldron, 54 Mich. 649.

[2] Luckie *v.* Johnston, 89 Ga. 321. As to effect of a notice printed on the bill that it is "payable at the office," or "not payable to agent," see Luckie *v.* Johnston, *supra;* Law *v.* Stokes, 32 N. J. L. 249; McKindly *v.* Dunham, 55 Wis. 515; Putnam *v.* French, 53 Vt. 402; Trainer *v.* Morison, 78 Me. 160.

[3] Butler *v.* Dorman, 68 Mo. 298; Higgins *v.* Moore, 34 N. Y. 417; Crosby *v.* Hill, 39 Oh. St. 100; McKindly *v.* Dunham, 55 Wis. 515; Brown *v.* Lally, 79 Minn. 38.

[4] Butler *v.* Dorman, *supra;* Meyer *v.* Stone, 46 Ark. 210; Cross *v.* Haskins, 13 Vt. 536; Barrett *v.* Deere, M. & M. 200.

[5] Law *v.* Stokes, 32 N. J. L. 249; Brooks *v.* Jameson, 55 Mo. 505; Home Machine Co. *v.* Ballweg, 89 Ill. 318; Harris *v.* Simmerman, 81 Ill. 413.

[6] Williams *v.* Walker, 2 Sandf. Ch. (N. Y.) 225; Haines *v.* Pohlmann, 25 N. J. Eq. 179; Crane *v.* Gruenewald, 120 N. Y. 274.

[7] Crane *v.* Gruenewald, *supra;* U. S. Bank *v.* Burson, 90 Iowa, 191.

[8] Doubleday *v.* Kress, 50 N. Y. 410.

[9] Ward *v.* Evans, 2 Salk. 442; Thorold *v.* Smith, 11 Mod. 71, 87; Ward *v.* Smith, 7 Wall. (U. S.) 447.

[10] Jackson *v.* Mutual Benefit Life Ins. Co., 79 Minn. 43.

[11] Broughton *v.* Silloway, 114 Mass. 71.

draft,[1] or merchandise.[2] He cannot compromise a claim and accept less than the full amount due,[3] or substitute himself as the debtor.[4] Nor can he extend the time for payment.[5] Nor can he receive payment before it is due.[6]

The power to collect may carry with it the power to employ the means necessary to that end, including the employment of counsel and the bringing of actions at law.[7]

(6) *Agent authorized to execute or indorse bills, notes, and checks.* The power to make or indorse negotiable instruments must ordinarily be sought in an express authority from the principal.[8] And such authority is strictly construed and must be exercised within its express limitations.[9] If the authority is to make a negotiable instrument for a specified amount, an instrument for a larger amount is not binding upon the principal.[10] If the authority is to make a negotiable instrument for a specified time, an instrument for a different time is not binding.[11] Authority to make notes for commercial purposes carries with it no authority to make accommodation notes.[12]

[1] Drain *v.* Doggett, 41 Iowa, 682.

[2] Mudgett *v.* Day, 12 Cal. 139; Williams *v.* Johnston, 92 N. C. 532.

[3] Mallory *v.* Mariner, 15 Wis. 172; Melvin *v.* Lamar Ins. Co., 80 Ill. 446; Whipple *v.* Whitman, 13 R. I. 512. But an agent may receive and credit a part payment. Whelan *v.* Reilly, 61 Mo. 565.

[4] Jackson *v.* Mut. Ben. L. Ins. Co., 79 Minn. 43; Aultman *v.* Lee, 43 Iowa, 404.

[5] Hutchings *v.* Munger, 41 N. Y. 155; Mallory *v.* Mariner, *supra.*

[6] Smith *v.* Kidd, 68 N. Y. 130.

[7] Ryan *v.* Tudor, 31 Kans. 366; Merrick *v.* Wagner, 44 Ill. 266.

[8] Robertson *v.* Levy, 19 La. An. 327; Temple *v.* Pomroy, 4 Gray (Mass.), 128; Jackson *v.* Bank, 92 Tenn. 154.

[9] Camden Safe Dep. & T. Co. *v.* Abbott, 44 N. J. L. 257; Batty *v.* Carswell, 2 Johns. (N. Y.) 48; Nixon *v.* Palmer, 8 N. Y. 398; Farmington Sav. Bank *v.* Buzzell, 61 N. H. 612.

[10] Blackwell *v.* Ketcham, 53 Ind. 184; King *v.* Sparks, 77 Ga. 285.

[11] Batty *v.* Carswell, 2 Johns. (N. Y.) 48; New York Iron Mine *v.* Citizens' Bank, 44 Mich. 344; King *v.* Sparks, 77 Ga. 285. A slight variation may not be fatal. Adams *v.* Flanagan, 36 Vt. 400.

[12] Wallace *v.* Bank, 1 Ala. 565; Ætna N. B. *v.* Ins. Co., 50 Conn. 167.

The power to make or indorse negotiable instruments may be implied as a necessary incident of powers expressly conferred.[1] But the mere fact that the agent is authorized to manage a business does not of itself show a power to make such instruments.[2]

§ 108. Contracts unauthorized.

If the agent has neither actual nor apparent authority for his act, the principal is not bound, for (1) he never authorized the contract, and (2) he never led a reasonably prudent man to believe that he authorized it. The third party must therefore look to the agent alone for redress.[3] If an agent be appointed by words *in præsenti*, but it is agreed that the agency shall not begin until the happening of some condition, the principal is not liable for contracts entered into by the agent in the interim unless the third party has been misled by the exhibition by the agent of an unconditional power, or by other conduct equivalent to a "holding out" on the part of the principal.[4] A third person has no right to rely upon the representations of the agent as to his authority.[5]

To this rule there are two exceptions, one based upon doctrines peculiar to negotiable instruments, and one upon statutory modifications. If the principal entrusts to the agent negotiable paper, and the agent sells or pledges it for a valuable consideration to a purchaser or pledgee without notice of its diversion, the latter gets a good title as against the principal, as fully as if the principal had authorized the transfer.[6] Under the Factors Acts a principal who entrusts

[1] Edmunds *v.* Bushell, L. R. 1 Q. B. 97; Odiorne *v.* Maxcy, 13 Mass. 178; Yale *v.* Eames, 1 Met. (Mass.) 486.

[2] New York Iron Mine *v.* Bank, 39 Mich. 644; Temple *v.* Pomroy, 4 Gray (Mass.), 128; Perkins *v.* Boothby, 71 Me. 91.

[3] Baines *v.* Ewing, L. R. 1 Ex. 320; *Re* Cunningham, 36 Ch. Div. 532; Jackson *v.* Bank, 92 Tenn. 154; Rice *v.* Peninsular Club, 52 Mich. 87.

[4] Rathbun *v.* Snow, 123 N. Y. 343.

[5] *Ibid.*

[6] Goodwin *v.* Robarts, 1 App. Cas. 476; Simmons *v.* London Joint Stock Bank, 1892, App. Cas. 201; Cheever *v.* Pittsburgh, &c. R., 150 N. Y. 59.

his goods to a factor for sale is bound by any sale, pledge, or other disposition of the goods, to a purchaser for value and without notice of the diversion, as fully as if such transfer had been authorized.[1]

§ 109. Contracts voidable.

A principal is not bound by contracts made within the scope of the authority where they are brought about by fraud or collusion between the agent and the third party. Thus if the third party promise the agent a commission or reward for bringing about a contract between the one promising and the principal of the agent, the contract so induced will be voidable at the election of the principal. "Any agreement or understanding between one principal and the agent of another, by which such agent is to receive a commission or reward if he will use his influence with his principal to induce a contract, or enter into a contract for his principal, is pernicious and corrupt, and cannot be enforced at law. . . . Such agreements are a fraud upon the principal, which entitle him to avoid a contract made through such agency."[2] But the principal may elect to take the benefit of the contract notwithstanding the fraud, and in such case the third party will be bound. And this is so even if the principal be a public corporation, as a city, since the contract is neither *malum in se* nor *malum prohibitum*, but one which the city might have made.[3] And after such election it may sue the third party for fraud, and the agent for money had and received to its use.[4]

2. *In Particular Agencies.*

§ 110. Introductory.

Little has been said heretofore as to the scope of particular agencies bearing distinctive names, nor will the purpose of this work admit of any extended discussion of the subject.

[1] *Post*, § 171.

[2] City of Findlay *v.* Pertz, 66 Fed. Rep. 427; Smith *v.* Sorby, 3 Q. B. D. 552 *n.*

[3] City of Findlay *v.* Pertz, *supra.*

[4] *Ibid.*; Mayor *v.* Lever, 1891, 1 Q. B. 168.

It will be useful, however, to call attention at this point to the fact that some agents have by custom a wider apparent authority than others, and that for the most part these are agents who are regularly engaged in transacting a special kind of business for the public generally. They are not, like common carriers and innkeepers, obliged to serve everybody who applies, and yet it is largely the custom to do so; and because of this, and the settled nature of their business, they are governed by well understood mercantile customs, in the light of which the principal on the one hand and the third person on the other are always presumed to deal. Another class of agents are those who serve but one principal, but from the nature of the principal's business are representing him in dealings with the public generally. These also, not because of their own business, as in the first class, but because of their principal's business, are governed by well understood mercantile customs. The first class is illustrated by the agencies of factors, brokers, auctioneers, and attorneys at law. The second class is illustrated by the agencies of cashiers of banks, insurance agents, and shipmasters.

§ 111. Factors.

(1) *Definition.* A factor is an agent whose regular business it is to receive consignments of goods and sell them for a commission. He may sell for the ordinary commission for the services of such an agent, or he may sell for an increased commission and guarantee his principal in the collection of the price. In the first case, he is called simply a factor or commission merchant; in the second, he is called a *del credere* factor or commission merchant, and is said to sell on a *del credere* commission.[1] If he accompanies a vessel and represents shippers at the ports where the vessel may touch, he is termed a supercargo.

(2) *Scope of authority.* As between the principal and the factor, the latter is bound to obey the instructions, and is liable like any other agent for any damages suffered from

[1] *Ante*, § 96.

his failure to do so.[1] He can depart from such instructions only when justified by an emergency in the nature of reasonable necessity,[2] or where he acts to protect himself from loss on his own advances or disbursements.[3] But as between the principal and third persons, the former is bound by the contracts made by the factor within the apparent scope of his authority. And this is very large. Custom has annexed to the agency powers so extended that buyers of the goods are generally protected when they buy in the usual manner and in the course of commercial dealings, and these customs have been supplemented by legislation looking to the same end.[4] Accordingly the factor has power to sell the goods in his own name, and at such time and for such prices as he deems best;[5] to warrant them so far as warranties are usual in the sale of similar goods;[6] to receive payment in a sale for cash, or negotiable paper in a sale on credit;[7] to sell on credit so far as it is usual in similar cases to do so;[8] and even to pledge the goods when necessary to secure the payment of charges against them or a draft drawn against the prospective proceeds by the principal.[9] He has no authority to barter the goods in exchange for others;[10] or to pledge them except to secure advances;[11] or to receive anything for them except lawful currency; or to compromise or arbitrate or subse-

[1] Talcott *v.* Chew, 27 Fed. Rep. 273; Phillips *v.* Moir, 69 Ill. 155.

[2] Greenleaf *v.* Moody, 13 Allen (Mass.), 363.

[3] Davis *v.* Kobe, 36 Minn. 214; Weed *v.* Adams, 37 Conn. 378; Parker *v.* Brancker, 22 Pick. (Mass.) 40. *Cf.* Sims *v.* Miller, 37 S. C. 402.

[4] *Post*, § 171.

[5] Baring *v.* Corrie, 2 B. & A. 137; Smart *v.* Sandars, 3 C. B. 380.

[6] Dingle *v.* Hare, 7 C. B. N. S. 145; Randall *v.* Kehlor, 60 Me. 37, Argersinger *v.* Macnaughton, 114 N. Y. 535.

[7] Drinkwater *v.* Goodwin, Cowp. 251; Daylight Burner Co. *v.* Odlin, 51 N. H. 56.

[8] Houghton *v.* Matthews, 3 B. & P. 485; Goodenow *v.* Tyler, 7 Mass. 36; Pinkham *v.* Crocker, 77 Me. 563.

[9] Boyce *v.* Bank, 22 Fed. Rep. 53.

[10] Guerreiro *v.* Peile, 3 B. & A. 616; Wheeler, &c. Co. *v.* Givan, 65 Mo. 89.

[11] Martini *v.* Coles, 1 M. & S. 140; Warner *v.* Martin, 11 How. (U. S.) 209.

quently extend the time of payment of the amount due on the sale.[1] The factor may sell in his own name, and it follows that the customary powers partake largely of the powers of an owner. The limitation is that the agent must *sell*, not pledge, or barter; but even this limitation has been removed by statute in many jurisdictions for the protection of innocent parties.[2]

(3) *Rights and liabilities of principal.* For all contracts made by the factor within the scope of the authority, as above explained, the principal is liable, and under the Factors Acts he is bound even where the factor pledges or barters the goods for his own benefit.[3] And this is true whether the principal be disclosed or not. In like manner the principal may avail himself of the benefits of the contract, whether disclosed or not.[4] The subject of foreign principals dealing through domestic factors is discussed hereafter.[5]

§ 112. Brokers.

(1) *Definition.* A broker is an agent or middleman whose business it is to make a bargain for another, or bring persons together to bargain, and receive a commission on the transaction as compensation.[6] He differs from a factor in that he does not usually have possession of the property which is the subject matter of the transaction, and in that he deals in the name of his principal. The field of brokerage is much larger than that of factorage. The factor buys and sells goods. The merchandise broker also does that; but there are in addition note and exchange brokers who buy and sell negotiable paper and foreign exchange; stock brokers who buy and sell stocks, bonds, and other securities; real estate brokers who buy and sell, rent and mortgage real estate; insurance

[1] Carnochan *v.* Gould, 1 Bailey (S. C.), 179; Howard *v.* Chapman, 4 C. & P. 508.

[2] *Post*, § 171.

[3] *Ibid.*

[4] *Post*, § 129.

[5] *Post*, § 187.

[6] Sibbald *v.* Bethlehem Iron Co., 83 N. Y. 378. See this case also for discussion of the question when a broker has earned his commissions; and also Plant *v.* Thompson, 42 Kans. 664.

brokers who negotiate insurance usually for the one insured; and other classes of brokers named for the particular character of business transacted.

(2) *Scope of authority.* The scope of a broker's authority is much narrower than that of a factor. He must obey instructions or act in accordance with recognized usages.[1] A merchandise broker is engaged, for instance, in selling goods for his principal, but it is doubtful whether he has any authority to warrant them,[2] although of course a warranty in the nature of a condition would, if false, avoid the contract;[3] and a "commercial traveller" who represents but one principal is to be distinguished from a broker.[4] He is authorized to make the memorandum required to satisfy the Statute of Frauds.[5] He may give credit, but only if usage warrants.[6] But he has no authority to sell in his own name,[7] or to agree to barter or pledge, or to rescind a contract once made by him,[8] nor has he any authority to receive payment since he has not possession of the goods.[9] As to other brokers than those engaged in buying and selling goods, their powers are fixed almost wholly by custom, and the principal is bound by all contracts within the limits of the custom.[10]

(3) *Liability of principal.* A principal is liable for the contract of his broker within the scope of the authority, and also for his frauds,[11] but not beyond the scope of the agency.[12]

[1] Wiltshire *v.* Sims, 1 Camp. 258; Clark *v.* Cumming, 77 Ga. 64.

[2] Dodd *v.* Farlow, 11 Allen (Mass.), 426; Smith *v.* Tracy, 36 N. Y. 79.

[3] Forcheimer *v.* Stewart, 65 Iowa, 593.

[4] As in Pickert *v.* Marston, 68 Wis. 465.

[5] Parton *v.* Crofts, 16 C. B. N. S. 11.

[6] Boorman *v.* Brown, 3 Q. B. 511; White *v.* Fuller, 67 Barb. (N. Y.) 267.

[7] Baring *v.* Corrie, 2 B. & A. 137.

[8] Xenos *v.* Wickham, L. R. 2 H. L. 296; Saladin *v.* Mitchell, 45 Ill. 79.

[9] Higgins *v.* Moore, 34 N. Y. 417; Crosby *v.* Hill, 39 Oh. St. 100.

[10] Skiff *v.* Stoddard, 63 Conn. 198; Markham *v.* Jaudon, 41 N. Y. 235, 256.

[11] Samo *v.* Ins. Co., 26 U. C. C. P. 405, affirmed 2 Can. Sup. C. 411.

[12] Clark *v.* Cumming, 77 Ga. 64.

§ 113. Auctioneers.

(1) *Definition.* An auctioneer is an agent whose business it is to sell property publicly to the highest bidder and receive a commission on the proceeds of the sale. He may receive compensation otherwise, or may work gratuitously, but his habit is, and therefore an element of his business is, to receive commissions. He represents the seller in making the terms of the sale, but may and usually does represent the buyer also in reducing the terms to writing, to satisfy the Statute of Frauds.[1] Until the fall of the hammer he is the agent of the seller; after that he is the agent of both parties.

(2) *Scope of authority.* As to his principal an auctioneer must obey instructions like any other agent.[2] As to third persons authority is to be gathered from the customs usually followed in auction sales. These are: to sell for cash, and not on credit or for other goods or for negotiable paper;[3] to receive the price in cash at the time of the sale, or such a deposit of cash as is prescribed by the terms of the sale; and, if it be not paid, to bring an action in his own name for its recovery;[4] to follow the terms of the sale, when these are known, and no others, so that if the terms prescribe for an interest-bearing note, with surety, cash cannot be received instead.[5] Ordinarily he has no implied authority to warrant the quality of the goods sold;[6] or to rescind a sale once made;[7] or to sell at private sale.[8] If he exceeds the authority actually conferred, and that implied from the nature of the agency, the principal is not bound.[9] But if he keeps within the

[1] White *v.* Proctor, 4 Taunt. 209; Walker *v.* Herring, 21 Gratt. (Va.) 678; Johnson *v.* Buck, 35 N. J. L. 338.

[2] Farr *v.* John, 23 Iowa, 286.

[3] Williams *v.* Evans, L. R. 1 Q. B. 352; Broughton *v.* Silloway, 114 Mass. 71.

[4] Thompson *v.* Kelly, 101 Mass. 291; Johnson *v.* Buck, *supra.*

[5] Morgan *v.* East, 126 Ind. 42.

[6] Blood *v.* French, 9 Gray (Mass.), 197; Payne *v.* Leconfield, 51 L. J. Q. B. 642.

[7] Nelson *v.* Aldridge, 2 Stark. 435.

[8] Marsh *v.* Jelf, 3 F. & F. 234.

[9] Bush *v.* Cole, 28 N. Y. 261.

authority, the principal is liable for refusing to complete the contract.[1]

§ 114. Attorneys at law.

(1) *Definition.* An attorney at law is an agent whose business it is, as a duly qualified officer of a court, to represent his principal in the conduct of litigation or other legal proceedings. A distinction exists in England between barristers, who represent the client at the bar, that is, when actually before the court, and solicitors, who represent the client generally throughout a legal proceeding.[2] In the United States, however, the distinctions between barristers, or advocates, or counsel, and solicitors, or attorneys, or proctors, has practically disappeared. The term attorney at law now includes the notion formerly conveyed by these separate terms. The courts generally have the power to prescribe the qualifications of those who appear before them to represent litigants, and it has even been doubted whether the legislature could, without constitutional sanction, deprive the courts of this power.[3]

(2) *Scope of authority.* The attorney is appointed to conduct the affairs of his client in court, and has therefore a very wide discretion in their management. All the usual and customary steps in a proceeding may be taken under this implied or customary authority and will bind the client. "An attorney at law has authority, by virtue of his employment as such, to do in behalf of his client all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only, and not the cause of action."[4] It has been generally held in the United States that this limitation of the authority to the control over remedies precludes the power to compromise the

[1] Cockcroft *v.* Muller, 71 N. Y. 367.

[2] See Sweet's Law Dictionary; 19 Am. Law Rev. 677. For the history of the rise of attorneys at law as a special class, see 1 Pollock and Maitland's Hist. of Eng. Law, 190–196.

[3] Matter of Goodell, 39 Wis. 232; *In re* Day, 181 Ill. 73.

[4] Moulton *v.* Bowker, 115 Mass. 36; Clark *v.* Randall, 9 Wis. 135.

claim, either before or after judgment.[1] In England the holding is otherwise, and in some of the United States.[2] But it is held that he may submit the claim to arbitration.[3] He may agree that property shall be sold pending an appeal as to the validity of a lien, for which a decree of sale has already been entered, and the money paid into court to abide the decision on the appeal.[4] He may direct a levy as a proper remedy for the collection of a claim, and if the levy be wrongful the principal is liable.[5] In general he may control the management of the proceeding, but he "may not compromise the rights of his client outside of his conduct of the action, or accept less than the full satisfaction sought, or release his client's right, or subject him to a new cause of action."[6]

§ 115. Bank cashiers.

(1) *Definition.* "The cashier is the executive officer, through whom the whole financial operations of the bank are conducted. He receives and pays out its moneys, collects and pays its debts, and receives and transfers its commercial securities. Tellers and other subordinate officers may be appointed, but they are under his direction, and are, as it were, the arms by which designated portions of his various functions are discharged."[7] A bank cashier is the chief executive agent of the bank; the directors are the deliberative managing agents. "It is not wholly unapt to liken the board of directors to a bench of judges, and the cashier to the clerk of the court."[8]

[1] Whipple *v.* Whitman, 13 R. I. 512; Maddux *v.* Bevan, 39 Md. 485; Watt *v.* Brookover, 35 W. Va. 323; Preston *v.* Hill, 50 Cal. 43.

[2] Prestwich *v.* Poley, 18 C. B. N. S. 806; Bonney *v.* Morrill, 57 Me. 368.

[3] Faviell *v.* Eastern Counties R., 2 Ex. 344; Brooks *v.* New Durham, 55 N. H. 559; Sargeant *v.* Clark, 108 Pa. St. 588. *Cf.* McPherson *v.* Cox, 86 N. Y. 472.

[4] Halliday *v.* Stuart, 151 U. S. 229.

[5] Morris *v.* Salberg, 22 Q. B. D. 614; Caswell *v.* Cross, 120 Mass. 545; Howell *v.* Caryl, 50 Mo. App. 440.

[6] Lewis *v.* Duane, 141 N. Y. 302, 314; Kirk's Appeal, 87 Pa. St. 24; James *v.* Ricknell, 20 Q. B. D. 164.

[7] Merchants' Bank *v.* State Bank, 10 Wall. (U. S.) 604, 650.

[8] 1 Morse on Banking, § 152.

(2) *Scope of authority.* Custom has fixed with considerable precision the authority of a bank cashier, and this authority he may be presumed to possess without special delegation from the directors, and even as against a special restriction unknown to a third person dealing with the bank. The question whether he does or does not possess authority to do any particular act is ordinarily one for the court and not for the jury.[1] By the powers inherent in his office a cashier has authority to draw checks or drafts upon the funds of the bank deposited with other banking or trust companies;[2] to indorse and transfer for collection, discount, or sale the negotiable paper or securities owned by the bank;[3] to buy and sell bills of exchange;[4] to borrow money;[5] to collect the moneys due the bank;[6] and to certify checks drawn by depositors against funds in the bank.[7] He has no power to bind the bank to accept a draft to be drawn in the future,[8] or to bind the bank on a certification of his own check,[9] or as accommodation indorser of his own note or bill.[10]

§ 116. Shipmasters.

(1) *Definition.* A shipmaster is an agent who has entrusted to him the management and government of the ship upon a voyage. He is the first or head officer upon a merchantman, and as such is responsible for the safety of the ship and cargo, and is vested in consequence with very extensive powers.[11]

[1] Merchants' Bank *v.* State Bank, *supra.*

[2] Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. (U. S.) 326.

[3] Wild *v.* Bank, 3 Mason (U. S. C. C.), 505.

[4] *Ibid.*

[5] Barnes *v.* Ontario Bank, 19 N. Y. 152; Crain *v.* Bank, 114 Ill. 516.

[6] Concord *v.* Bank, 16 N. H. 26.

[7] Merchants' Bank *v.* State Bank, *supra;* Cooke *v.* State Bank, 52 N. Y. 96. A verbal certification was held good in Espy *v.* Bank, 18 Wall. (U. S.) 604. Denying a cashier's inherent power to certify checks, see Mussey *v.* Eagle Bank, 9 Met. (Mass.) 306.

[8] Flannagan *v.* California N. Bank, 56 Fed. Rep. 959.

[9] Claflin *v.* Farmers', &c. Bk., 25 N. Y. 293.

[10] West St. Louis Sav. Bk. *v.* Shawnee County Bk., 95 U. S. 557.

[11] Hubbell *v.* Denison, 20 Wend. (N. Y.) 181; Martin *v.* Farnsworth, 1 Jones & Spencer (N. Y. City Superior Court), 246.

(2) *Scope of authority.* As regards the navigation of the vessel the master has absolute control and authority. As regards discipline his authority is extensive, but its wilful abuse will not render the owner liable to a seaman, though it might to a passenger.[1] And such discipline is justified at all only on the high seas and not in port.[2] As regards authority to make contracts, the nature and extent of such authority is determined by the customs of the seas and the necessities of the situation, and is to be determined by the law of the country to which the ship belongs.[3] He has authority to make "contracts relative to the usual employment of the ship; to give a warranty in such contracts; to enter into contracts for repairs and necessaries to the ship;" to sell a perishable cargo to preserve it from destruction, or a wrecked ship and cargo where it is impossible or highly imprudent to attempt to carry them to their destination; to hypothecate the ship, freight, and cargo in case of extreme necessity; to borrow money in case of extreme necessity.[4] The further discussion of a shipmaster's powers belongs to a treatise on shipping and admiralty law.

[1] Gabrielson *v.* Waydell, 135 N. Y. 1.

[2] Padmore *v.* Piltz, 44 Fed. Rep. 104.

[3] The Karnak, L. R. 2 P. C. 505; The Gaetano and Maria, L. R. 7 P. D. 137; The August, 1891, Pro. 328.

[4] Evans on Agency (2d ed.), pp. 146–152; Ewell's ed. pp. 176–182; Story on Agency, §§ 116–123; McCready *v.* Thorn, 51 N. Y. 454; Gunn *v.* Roberts, L. R. 9 C. P. 331; Arthur *v.* Barton, 6 M. & W. 138.

CHAPTER X.

CONTRACT OF AGENT IN BEHALF OF AN UNDISCLOSED PRINCIPAL.

§ 117. Introductory.

It sometimes happens that an agent makes a contract in his own name and ostensibly for his own benefit, but in reality for the benefit of an undisclosed principal. In such a case there are two relations established, — first, the relation of the agent to the third person under the contract made in the agent's name, and second, the relation of the principal to the third person under the contract made for the principal's benefit. The first relation will be discussed in a subsequent chapter.[1] We are now concerned with the liabilities and rights of the undisclosed principal.

In order to make clear the outlines of a difficult branch of the law we will discuss: (1) the doctrine of the privity of contract in the English law and its general application to the subject of the undisclosed principal; (2) the rules applicable to the liability of an undisclosed principal; (3) the rules applicable to the rights of an undisclosed principal.

1. *The Doctrine of Privity of Contract.*

§ 118. General statement of the doctrine.

A fundamental notion of the common law is that a contract creates strictly personal obligations between the contracting parties. "A person has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent."[2] It was this notion that lay at the basis of the common law rules as to the non-assignability

[1] *Post*, § 196 *et seq.*

[2] Boston Ice Co. *v.* Potter, 123 Mass. 28; Boulton *v.* Jones, 2 H. & N. 564.

of contracts;[1] it has even yet yielded only to the extent of allowing an assignee to enforce rights owing to his assignor where the assignor has fully performed his obligations and it can make no difference to the defendant to whom he pays money or delivers goods, or where the assignee can fairly be deputized to discharge the assignor's duties, the latter remaining liable for any breach.[2] It is still a question of much difficulty as to how far executors or administrators succeed to the rights and obligations of their decedents under operation of law.[3] The doctrine is very comprehensive that "you have a right to the benefit you contemplate from the character, credit, and substance of the party with whom you contract."[4]

Even if B makes a promise to C, upon a consideration moving from the latter, expressly for the benefit of D, D cannot in England maintain an action upon the promise.[5] In the United States, however, such actions are generally allowed, at least where at the time of the promise there is a duty or obligation owing from C to D which C seeks to discharge or provide for by giving to D the benefit of the contract with B. This has been put upon the doctrine of agency and subsequent ratification;[6] upon the doctrine of a kind of common law "trust" enforceable as for money or other thing had and received to the benefit of C;[7] upon the doctrine "that the law,

[1] Pollock on Cont. (6th ed.) 204, 701; Ames, 3 Harv. Law Rev. 338–339.

[2] Arkansas, &c. Co. *v.* Belden Co., 127 U. S. 379; Rochester Lantern Co. *v.* Stiles, &c. Co., 135 N. Y. 209; La Rue *v.* Groezinger, 84 Cal. 281; Robson *v.* Drummond, 2 B. & Ad. 303; British Waggon Co. *v.* Lea, L. R. 5 Q. B. D. 149.

[3] Dickinson *v.* Calahan's Adm'rs, 19 Pa. St. 227; Lacy *v.* Getman, 119 N. Y. 109; Drummond *v.* Crane, 159 Mass. 577.

[4] Humble *v.* Hunter, 12 Q. B. 310, 317; Boston Ice Co. *v.* Potter, *supra;* Arkansas, &c. Co. *v.* Belden Co., *supra.*

[5] Tweddle *v.* Atkinson, 1 B. & S. 393. *Accord* Exchange Bank *v.* Rice, 107 Mass. 37; Borden *v.* Boardman, 157 Mass. 410; Linneman *v.* Moross, 98 Mich. 178.

[6] See opinion of Johnson, C. J., and Denio, J., in Lawrence *v.* Fox, 20 N. Y. 268.

[7] See Vrooman *v.* Turner, 69 N. Y. 280; Jefferson *v.* Asch, 53 Minn 446.

operating upon the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation on which the action is founded;"[1] and upon a doctrine of convenience, namely, that "it accords the remedy to the party who in most instances is chiefly interested to enforce the promise, and avoids multiplicity of actions."[2] The doctrine as applied in the United States is confessedly an anomaly, but serves to illustrate the fact that anomalous doctrines are sometimes admitted into the law where they aid to work out substantial justice, and that the strict common law rule as to privity of contract has important exceptions.[3]

§ 119. Application to agency generally.

The general doctrines of agency do not run counter to the fundamental dogma as to privity of contract. Where the principal is disclosed the third party deals with him, and not with the agent, and relies upon his character, credit, and substance, and not upon that of the agent. The agency is merely a means through which the minds of the principal and the third party meet in mutual agreement. When once the contract is formed the agent drops out. The difficulties arising from unauthorized contracts subsequently ratified have already been discussed.[4] The difficulties arising in the enforcement of rights against the agent upon an unauthorized contract not subsequently ratified will be discussed hereafter.[5] We have now to consider the difficulties attending the enforcement of rights against an undisclosed principal, and the greater difficulties attending the enforcement of rights by an undisclosed principal.

§ 120. Application to contracts for undisclosed principal.

A more serious difficulty presents itself in the doctrines peculiar to undisclosed principals. In the case of a contract

[1] McDowell *v.* Laev, 35 Wis. 171.

[2] Lehow *v.* Simonton, 3 Colo. 346; Wood *v.* Moriarty, 15 R. I. 518.

[3] See Huffcut's Anson on Cont. pp. 279–282; Harriman on Cont. pp. 216–228.

[4] *Ante*, § 38. An unauthorized contract made for an undisclosed principal cannot be ratified. Keighley *v.* Durant, 1901, App. Cas. 240; *ante*, § 32.

[5] *Post*, § 183.

made by an agent in his own name, as principal, the third party obviously relies upon the character, credit, and substance of the agent alone, and intends to acquire rights against the agent and against no one else, and to incur obligations to the agent and to no one else. So far at least as the third party is concerned it is a contract between him and the agent, and the principal is never for a moment in his contemplation. The strict application of the common law rule would lead to the conclusion, therefore, that the principal could neither sue nor be sued upon the contract.

Yet just the opposite conclusion prevails. The case escapes the common law doctrine and establishes the sweeping rule that an undisclosed principal may both sue and be sued upon a contract made in his behalf or to his secret use by his agent. "If an agent makes a contract in his own name, the principal may sue and be sued upon it; for it is a general rule, that whenever an express contract is made, an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person with whom, in point of law, it was made."[1] The rule is probably the outcome of a kind of common law equity, powerfully aided and extended by the fiction of the identity of principal and agent and the doctrine of reciprocity or mutuality of contractual obligations. The rule has two distinct parts: (1) that the undisclosed principal may be sued; (2) that the undisclosed principal may sue. The first is probably based upon the notion that it is inequitable to allow the principal to take the benefits of a contract made by his agent and compel the third person to look only to the agent for compensation. The second is based upon the notion that contract obligations require mutuality, and that, since the principal may be sued he must also be permitted to sue. The fiction of identity is employed to establish a real or true assent on the part of the principal in place of an assent or promise constructed by the law, such as is created in all that class of obligations known as quasi-contracts. Whatever the true grounds of this doctrine, it is at all events conceded that the one case in which

[1] Cothay *v.* Fennell, 10 B. & C. 671.

a person not a party to a contract may unquestionably sue and also be sued is the case of the undisclosed principal.

§ 121. Suits against undisclosed principal.

The action against an undisclosed principal rests logically upon the ground that the principal's estate has had the benefit of the contract and ought to bear the burden. This doctrine is as old as the Year Books in which we read that an action of debt was maintained against an abbot on the count that the plaintiff had lent money and sold a horse to a monk, "which money and horse came to the profit of the house, etc."[1] It is illustrated in many modern cases, where, clearly, the decision need not go further than the doctrine that where the principal's estate is unjustly enriched at the expense of the third party's, the latter may maintain assumpsit for the value of the benefit conferred.[2] Such an action does not logically rest upon a true contractual obligation arising from the assent of the parties, but upon a quasi-contractual obligation created by the law on grounds of justice and fair dealing. But for the aid of the fiction of identity of principal and agent the courts might have been driven into so treating it, and limiting the recovery to the measure of benefits conferred. In that case the doctrine would never have been extended to include the second half of the rule which gives the undisclosed principal an action against the third party, except in the case where the third person's estate had been unjustly enriched at the expense of the principal's.

This is illustrated in the case of Kayton *v.* Barnett.[3] X having declined to sell to P, the latter procured A to purchase. X expressly stated that he would not sell to P, and A thereupon assured X that he was not buying for P but for himself.

[1] Y. B. 34 & 35 Edw. I. pp. 566–569 (1307). See also Doctor and Student (1518), where we read (Dia. ii. ch. 42): "If the servant in that case buy them in his own name, not speaking of his master, the master shall not be charged, unless the things bought come to his use." And see Gurratt *v.* Cullum, stated in Scott *v.* Surman, Willes, 400, 405.

[2] Nelson *v.* Powell, 3 Doug. 410; Wilson *v.* Hart, 7 Taunt. 295; Kayton *v.* Barnett, 116 N. Y. 625; Henderson *v.* Mayhew, 2 Gill (Md.), 393.

[3] 116 N. Y. 625.

X was nevertheless allowed to maintain an action against P for the price. The court through Follett, Ch. J., said: "Notwithstanding the assertion of the plaintiffs that they would not sell to the defendants, they, through the circumvention of Bishop and the defendants, did sell the property to the defendants, who have had the benefit of it, and have never paid the remainder of the purchase-price pursuant to their agreement. Bishop was the defendants' agent. Bishop's mind was, in this transaction, the defendants' mind, and so the minds of the parties met, and the defendants having, through their own and their agent's deception, acquired the plaintiffs' property by purchase, cannot successfully assert that they are not liable for the remainder of the purchase-price because they, through their agent, succeeded in inducing the defendants to do that which they did not intend to do, and, perhaps, would not have done had the defendants not dealt disingenuously."

Here is a curious mixture of the equitable notion that the defendant ought to reimburse the plaintiff for the benefits received, and the notion that the defendant had in verity promised to do so because his agent had promised, and the agent's mind is the principal's mind and so the minds of the parties have met.

But the doctrine once established that the contract obligation rests upon assent, and it will speedily be extended beyond the cases where benefits have been conferred, and the third party will be given an action upon a bilateral executory contract.[1] And actions will be given in cases where the principal is guilty of no inequitable conduct, as where, for instance, he has given his agent funds with which to purchase, and the agent has purchased in his own name on credit, under circumstances where, had the agency been known, it would be reasonable to infer that he had authority to purchase on credit.[2]

[1] Episcopal Church *v.* Wiley, 2 Hill Ch. (S. C.) 584; s. c. 1 Riley, Ch. (S. C.) 156; Schmaltz *v.* Avery, 16 Q. B. 655.

[2] See remarks of Wallace, J., in Fradley *v.* Hyland, 37 Fed. Rep. 49, 52–53, and the conclusion, "But it is probably too late to consider the

§ 122. Suits by undisclosed principal.

Having reached the conclusion, by aid of the fiction of identity, that the minds of the parties have met, it is easy to invoke the doctrine of reciprocity or mutuality of contract and hold that the undisclosed principal may also sue the third party, although, in fact, the third party never undertook and never intended to undertake an obligation in favor of the principal.[1] "The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein; and notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him."[2] And so it follows that a contract made between A and B, each believing the other to be acting in his own behalf, may be shown to be a contract between P and X, the two undisclosed principals.[3]

Earlier cases which held that only the promisee in the written instrument could sue upon it,[4] must be regarded as overruled or overwhelmed by later decisions which proceed on the theory that the nominal promisee (the agent) and the real promisee (the principal) are identical.

§ 123. Parol evidence rule.

It is now settled law that the admission of parol evidence to show that a written contract made in the name of the agent was in fact made in behalf of an undisclosed, or if disclosed, unnamed principal, does not violate the rule

questions thus suggested upon principle." See also Watteau *v.* Fenwick, 1893, 1 Q. B. 346; Hubbard *v.* Tenbrook, 124 Pa. St. 291.

[1] Cothay *v.* Fennell, 10 B. & C. 671; Taintor *v.* Prendergast, 3 Hill (N. Y.), 72; Eastern R. Co. *v.* Benedict, 5 Gray (Mass.), 561. For an illustration of the difficulty of establishing this doctrine, see Scrimshire *v.* Alderton, 2 Str. 1182.

[2] Ford *v.* Williams, 21 How. (U. S.) 287; Burton *v.* Goodspeed, 69 Ill. 237.

[3] Darrow *v.* Horne Produce Co., 57 Fed. Rep. 463.

[4] United States *v.* Parmele, 1 Paine (U. S. C. C.), 252. *Cf.* Huntington *v.* Knox, 7 Cush. (Mass.) 371.

against the admission of parol evidence to vary the terms of a written contract.[1] "Whatever the original merits of the rule that a party not mentioned in a simple contract in writing may be charged as principal upon oral evidence, even where the writing gives no indication of an intent to bind any other person than the signer, we cannot reopen it, for it is as well settled as any part of the law of agency."[2] And this rule extends to contracts required by the Statute of Frauds to be in writing.[3] This rule must be viewed in connection with these qualifications: (1) that parol evidence is not admissible to introduce into a sealed instrument or a negotiable instrument a party not named or described in the instrument;[4] (2) that parol evidence is not admissible to discharge the agent from liability on a contract made in his name, for "to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement, which cannot be done;"[5] (3) that parol evidence is not admissible to contradict the express terms of a written instrument.[6] Whether any distinction should be taken between a case where there is no disclosure of the principal whatever, and a case where the principal is disclosed in the negotiation but not named in the writing, is in dispute. It is contended that in the latter case there is clearly an election to look to the agent alone.[7] But this is treated as a question of fact in other jurisdictions.[8]

[1] Ford *v.* Williams, 21 How. (U. S.) 287; Huntington *v.* Knox, 7 Cush. (Mass.) 371; Darrow *v.* Horne Produce Co., 57 Fed. Rep. 463; Wm. Lindeke Land Co. *v.* Levy, 76 Minn. 364, overruling Powell *v.* Oleson, 32 Minn. 288.

[2] Byington *v.* Simpson, 134 Mass. 169.

[3] Lerned *v.* Johns, 9 Allen (Mass.), 419; Kingsley *v.* Siebrecht, 92 Me. 23.

[4] *Post*, §§ 127–128, 134–135.

[5] Higgins *v.* Senior, 8 M. & W. 834.

[6] Humble *v.* Hunter, 12 Q. B. 310.

[7] Chandler *v.* Coe, 54 N. H. 561.

[8] Byington *v.* Simpson, *supra*; Calder *v.* Dobell, L. R. 6 C. P. 486.

2. *Liability of an Undisclosed Principal.*

§ 124. General rule.

Subject to the exceptions hereafter enumerated, an undisclosed principal is liable to a third person with whom his agent has dealt within the scope of the agency in the same way and to the same extent as a disclosed principal, although the third person gave exclusive credit to the agent supposing him to be the principal.[1]

This does not rest upon the doctrine of "holding out the agent," since obviously the third party has not been misled in that respect. It rests upon the anomalous doctrines already explained, and has been compared to the liability of a dormant partner or of a master for a servant's torts.[2] Yet the doctrines as to the extent of an agent's powers seem to be applied to the agent for an undisclosed principal in the same way as to an agent of a disclosed principal. "Once it is established that the defendant was the real principal, the ordinary doctrine as to principal and agent applies — that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority. It is said that it is only so where there has been a holding out of authority — which cannot be said of a case where the person supplying the goods knew nothing of the existence of a principal. But I do not think so. Otherwise, in every case of undisclosed principal, or at least in every case where the fact of there being a principal was undisclosed, the secret

[1] Thomson *v.* Davenport, 9 B. & C. 78; Kayton *v.* Barnett, 116 N. Y. 625; Hubbard *v.* Tenbrook, 124 Pa. St. 291; Schendel *v.* Stevenson, 153 Mass. 351; Watteau *v.* Fenwick, 1893, 1 Q. B. 346; Levitt *v.* Hamblet, 1901, 1 K. B. 53.

[2] Watteau *v.* Fenwick, *supra.* See the suggestion in Byington *v.* Simpson (134 Mass. 169), that the liability of an undisclosed principal rests upon considerations similar to those which fix a master's liability for the torts of his servant, — considerations which, in this case, escape the doctrines of estoppel as to the fact of the agency, although, apparently, not as to its extent.

limitation of authority would prevail and defeat the action of the person dealing with the agent and then discovering that he was an agent and had a principal."[1] It appears, therefore, first, that an undisclosed principal is liable upon a contract made by his agent because the agent's act is the act of the principal or the agent's name has been adopted by the principal for the purpose of the contract, and, second, that having fictionally established the privity in this fashion, the law goes on to apply the usual doctrines of agency in order to determine the extent of the agent's authority. It is obvious, however, that this is all sheer assumption and that there can be in such a case no real basis for estoppel.

To the general rule of liability there are, however, certain well defined exceptions or qualifications which must now be noticed.

§ 125. First exception. — State of accounts.

The right of the third person to proceed against the undisclosed principal is subject to the state of accounts between the principal and agent. The exact nature and extent of this exception is, however, involved in some uncertainty.

(1) *Origin of the doctrine.* The leading case on this subject is *Thomson* v. *Davenport*,[2] where the *dictum* was pronounced that, "if a person sells goods (supposing at the time of the contract he is dealing with a principal), but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterward recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal." This *dictum* was said to be too broad in *Heald* v. *Kenworthy*,[3] and the doctrine was there declared

[1] Watteau *v.* Fenwick, *supra*, per Wills, J. See criticism in 9 Law Q. Rev. 111.

[2] 9 Barn. & Cress. 78, 86; 2 Smith's Leading Cases.

[3] 10 Ex. 739.

to be that, "if the conduct of the seller [the third person] would make it unjust for him to call upon the buyer for the money; as, for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to a settlement on the matter, or if any representation to that effect is made by the seller, either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal." In a later English case[1] a distinction was drawn between the case where the existence of a principal is wholly undisclosed, and the agent contracts as principal, and the case where the existence of a principal is disclosed, but the principal is unnamed and unknown; the doctrine of *Thomson* v. *Davenport* being held applicable to the first state of facts, and the doctrine of *Heald* v. *Kenworthy* to the second. But in *Irvine* v. *Watson*,[2] this distinction is said to be "difficult to understand," and the doctrine of *Heald* v. *Kenworthy* is expressly approved. The controversy therefore is as to whether settlement in good faith by the principal with the agent will discharge the principal, or whether the settlement must have been in reliance upon such conduct on the part of the third person as will work an estoppel against the latter.

(2) *English doctrine.* The English doctrine now is that the principal is discharged from liability to the third person only where the third person has by his conduct led the principal to believe that there has been a settlement between the third person and the agent, or that, with knowledge of the principal's liability, the third person elects to give credit exclusively to the agent.[3] In other words the principal must show that the third person is by positive conduct estopped to claim recourse against the principal.

(3) *American doctrine.* The doctrine in the United States seems to have followed the *dictum* in *Thomson* v.

[1] Armstrong *v.* Stokes, L. R. 7 Q. B. 598.

[2] L. R. 5 Q. B. Div. 414.

[3] Irvine *v.* Watson, *supra;* Davison *v.* Donaldson, L. R. 9 Q. B. Div. 623; Pollock on Cont. (6th ed.) 99.

Davenport. The principal is said to be discharged where he has in good faith paid the agent or made such a change in the state of the account between the agent and himself that he would suffer loss if he should be compelled to pay the seller.[1] In other words mere delay on the part of the third person may prejudice the principal and work an estoppel without other and positive conduct.

§ 126. **Second exception. — Election to hold agent.**

Where the third party, after discovering the principal, unequivocally elects to regard the agent as the sole responsible contracting party, he cannot afterwards proceed against the principal.[2] What constitutes a final or unequivocal election is a question of fact, though the conduct may be so decisive as to establish an election in point of law, or so indecisive as to render unwarranted a finding that there was an election. Bringing an action against the agent has an evidential force, but does not necessarily constitute an election.[3] It is generally held that an unsatisfied judgment is not conclusive proof of an election;[4] though the ruling is otherwise in England and some of our States.[5] Proving a claim in bankruptcy is not conclusive.[6] Nor taking the agent's promissory note.[7]

It has been held that where at the time the contract is made the third party knows the principal, but accepts a

[1] Fradley *v.* Hyland, 37 Fed. Rep. 49; Thomas *v.* Atkinson, 38 Ind. 248; Laing *v.* Butler, 37 Hun (N. Y.), 144; Knapp *v.* Simon, 96 N. Y. 284; Story on Agency, § 449; 23 Am. Law Rev. 565.

[2] Addison *v.* Gandasequi, 4 Taunt. 574; Paterson *v.* Gandasequi, 15 East, 62; Kingsley *v.* Davis, 104 Mass. 178; Kendall *v.* Hamilton, L. R. 4 App. Cas. 504.

[3] Cobb *v.* Knapp, 71 N. Y. 348; Steele Smith Grocery Co. *v.* Potthast, 109 Iowa, 413; Curtis *v.* Williamson, L. R. 10 Q. B. 57.

[4] Beymer *v.* Bonsall, 79 Pa. St. 298; Maple *v.* R. Co., 40 Oh. St. 313; Brown *v.* Reiman, 48 N. Y. App. Div. 295.

[5] Pollock on Cont. (6th ed.) 100, *citing* Priestley *v.* Fernie, 3 H. & C. 977; Kingsley *v.* Davis, *supra.*

[6] Curtis *v.* Williamson, L. R. 10 Q. B. 57.

[7] Merrill *v.* Kenyon, 48 Conn. 314; Pentz *v.* Stanton, 10 Wend. (N. Y.) 271; Harper *v.* Tiffin N. B., 54 Oh. St. 425.

written instrument in the name of the agent, he makes an election to look to the agent alone, and parol evidence is inadmissible to charge the principal.[1] But this is doubtful.[2]

It is held in England that a foreign principal cannot sue or be sued on a contract made by his agent in England unless it clearly appears that the agent was authorized to make his principal a party and that the principal, and not the agent, was intended to be the contracting party.[3] It is presumed that the third party gives credit exclusively to the agent in such a case. In the United States it is held that there is no such presumption, and the question whether exclusive credit is given to the agent is one of fact.[4]

§ 127. Third exception. — Contract under seal.

Where the contract between the agent and third party is under seal (the seal not being merely superfluous), the principal is not liable. It is a strict rule of the common law that only the parties named or described in a sealed instrument can sue or be sued upon it.[5] This rule involves the question as to the form in which an agent should execute a sealed instrument in order to bind his principal. Where one partner (A. B.) under a power of attorney from the other (C. D.) executed a sealed instrument, "A. B." "For C. D., A. B." it was held that C. D. was bound.[6] But where the trustees of a church executed a sealed instrument, "A. B., C. D., and E. F., trustees of the Baptist Church of R," it was held that the church was not bound.[7] The

[1] Chandler *v.* Coe, 54 N. H. 561.

[2] Byington *v.* Simpson, 134 Mass. 169; Merrill *v.* Kenyon, 48 Conn. 314; Calder *v.* Dobell, L. R. 6 C. P. 486.

[3] Die Elbinger Actien-Gesellschaft *v.* Claye, L. R. 8 Q. B. 313; Hutton *v.* Bulloch, L. R. 9 Q. B. 572.

[4] Kirkpatrick *v.* Stainer, 22 Wend. (N. Y.) 244; Kaulback *v.* Churchill, 59 N. H. 296; *post*, § 187.

[5] *Post*, § 188; Briggs *v.* Partridge, 64 N. Y. 357; Borcherling *v.* Katz, 37 N. J. Eq. 150; *Re* Pickering's Claim, L. R. 6 Ch. App. 525.

[6] Wilks *v.* Back, 2 East, 142; Mussey *v.* Scott, 7 Cush. (Mass.) 215; McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274.

[7] Taft *v.* Brewster, 9 Johns. (N. Y.) 334.

recitals of the instrument, and particularly of the attestation clause, and the manner of the signing, must determine whether the instrument is the obligation of the principal or of the agent.[1] Where an instrument is executed in behalf of the government, and the fact clearly appears by the recitals, but the agent affixes his own name and seal, the government is bound and not the agent.[2] But the agent of a private principal must execute the instrument in the name of, or on behalf of, his principal in order to bind the latter.[3] The rule applies equally to a principal who is disclosed in the negotiations but whose name and seal are not effectively affixed to the instrument.

In those states in which the statutes have made a seal unnecessary to the validity of a deed, the courts nevertheless treat the deed as a sealed instrument so far as concerns the rule that an undisclosed principal can neither sue nor be sued upon it.[4]

§ 128. Fourth exception. — Negotiable instrument.

Only the party whose name appears as the obligor on a negotiable instrument can be sued upon it. Parol evidence is therefore inadmissible to charge an undisclosed or unnamed principal upon such an instrument.[5] But if there be an ambiguity on the face of the paper as to whether the principal or agent is intended to be bound, parol evidence is admissible to remove the ambiguity.[6]

[1] Stinchfield *v.* Little, 1 Me. 231; Elwell *v.* Shaw, 16 Mass. 42; Northwestern Distilling Co. *v.* Brant, 69 Ill. 658; Philadelphia, &c. R. *v.* Howard, 13 How. (U. S.) 307; Bradstreet *v.* Baker, 14 R. I. 546.

[2] Hodgson *v.* Dexter, 1 Cranch (U. S.), 345; Dawes *v.* Jackson, 9 Mass. 490; Sheffield *v.* Watson, 3 Caines (N. Y.), 69; *post*, § 203.

[3] The English Conveyancing Act (44 & 45 Vict. c. 41) provides (§ 46) that a deed executed in the name of the donee of a power of attorney, by the authority of the donor of the power, shall be as effectual as if executed in the name of the donor.

[4] Sanger *v.* Warren, 91 Tex. 472.

[5] Bradlee *v.* Boston Glass Manufactory, 16 Pick. (Mass.) 347; Sparks *v.* Dispatch Transfer Co., 104 Mo. 531; Ducarrey *v.* Gill, M. & M. 450.

[6] Reeve *v.* First N. B., 54 N. J. L. 208; Bean *v.* Pioneer Mining Co., 66 Cal. 451.

Whether the signature is that of the principal or that of the agent must be determined by considering the recitals of the instrument, the marginal headings, and the form of the signature itself. The construction of signatures to negotiable instruments is fully discussed in a subsequent chapter.[1]

It seems, however, that the third party may disregard the negotiable instrument and proceed against the undisclosed principal upon the common counts or original consideration.[2]

3. *Rights of an Undisclosed Principal.*

§ 129. General rule.

Subject to the exceptions and qualifications hereafter enumerated, an undisclosed principal may bring an action in his own name upon contracts made by his agent in his behalf, although the third party supposed that he was dealing with the agent as principal.[3] This rule is said to be the necessary corollary of the one which gives the third person a right of action against the undisclosed principal, since mutuality of remedial rights is clearly just. It follows that two undisclosed principals may contract through their respective agents, and that the contract will give to each (subject to the enumerated exceptions) the same rights and liabilities as if they had been disclosed principals or had contracted in person.[4] The rule is applicable to *del credere* agencies as well as to ordinary agencies.[5] This right of the principal is superior to the right of the agent, and when the principal has once given notice of his intention to exercise it, the third party will settle with the agent at his peril.[6] If the contract be in writing (not under seal or negotiable), it does not violate the rule against vary-

[1] *Post*, §§ 189–195.

[2] Pentz *v.* Stanton, 10 Wend. (N. Y.) 271; Harper *v.* Tiffin N. B., 54 Oh. St. 425.

[3] Norfolk *v.* Worthy, 1 Camp. 337; Sadler *v.* Leigh, 4 Camp. 195; Spurr *v.* Cass, L. R. 5 Q. B. 656; Huntington *v.* Knox, 7 Cush. (Mass.) 371; Taintor *v.* Prendergast, 3 Hill (N. Y.), 72; Talcott *v.* Wabash R., 159 N. Y. 461; Barham *v.* Bell, 112 N. C. 131.

[4] Darrow *v.* Horne Produce Co., 57 Fed. Rep. 463.

[5] Hornby *v.* Lacy, 6 M. & S. 166.

[6] Pitts *v.* Mower, 18 Me. 361; Huntington *v.* Knox, *supra; post*, § 208.

ing the terms of written instruments by parol to admit parol evidence for the purpose of showing the real principal.[1] But it would vary the instrument to admit parol evidence to discharge the agent.[2]

§ 130. First exception. — State of accounts.

The right of the undisclosed principal to sue the third party is subject to the equities and the state of the accounts existing between the agent and the third party at the time the right is asserted. In other words the principal cannot assert his rights without leaving to the third party exactly the same rights as if the agent had been in fact the principal.[3] The cases applying this doctrine have been mainly those where the agent sold goods in his own name, and under these circumstances the distinction is made between the case where the agent has possession of the goods, and where he has not. In the former case the right of set-off which might be asserted against the agent may be asserted against the undisclosed principal; in the latter case it may not.[4] But the doctrine is equally applicable to contracts other than those for the sale of goods.[5]

The doctrines under this head resolve themselves into a general doctrine of estoppel. When the principal by his conduct leads third persons to believe that the agent is the principal, the real principal is estopped from asserting against such third persons any claims to their prejudice. Thus if the third person has paid the agent,[6] or has a right of set-off against him,[7] the principal cannot enforce his claim to the

[1] Darrow *v.* Horne Produce Co., *supra; ante*, § 123.

[2] *Post*, § 197.

[3] Rabone *v.* Williams, 7 T. R. 360 *n.*; George *v.* Clagett, 7 T. R. 359; Montagu *v.* Forwood, 1893, L. R. 2 Q. B. 350; Gardner *v.* Allen, 6 Ala. 187; Peel *v.* Shepherd, 58 Ga. 365; Taintor *v.* Prendergast, 3 Hill (N. Y.), 72.

[4] Bernshouse *v.* Abbott, 45 N. J. L. 531.

[5] Montagu *v.* Forwood, *supra.*

[6] Coates *v.* Lewes, 1 Camp. 444; Ramazotti *v.* Bowring, 7 C. B. N. S. 851.

[7] Borries *v.* Imperial Ottoman Bank, L. R. 9 C. P. 38; Montagu *v.* Forwood, 1893, 2 Q. B. 350; Stebbins *v.* Walker, 46 Mich. 5.

prejudice of such payment or right of set-off.[1] But if before such payment is made or such right of set-off accrues the third person has received notice that the agent was not in fact the principal, then he has not been misled and cannot claim an estoppel.[2] The state of the third person's mind is the important inquiry. Did he or did he not know that the agent was not the real principal? It seems that mere means of knowledge will not be equivalent to notice.[3] But if the third person knew that the agent was contracting as agent, although he did not know whose agent, he cannot claim an estoppel against the principal.[4] And it is even held that if the agent is one who commonly contracts for undisclosed principals, though also for himself, the third person cannot assume that the agent is contracting for himself, and would not therefore be entitled to a set-off as against the undisclosed principal.[5]

Where an agent contracting as principal sells his principal's goods and also his own in one contract, the principal cannot sever the contract and maintain a separate suit for the value of his own goods.[6]

Payment, or an allowance by way of set-off, to an agent who has a lien on the goods of his undisclosed principal, is binding on the principal.[7]

§ 131. Second exception. — Estoppel.

Analogous to the doctrine of the preceding section is the rule that where the principal invests his agent with the

[1] Pollacek *v.* Scholl, 51 N. Y. App. Div. 319.

[2] Mildred *v.* Maspons, 8 App. Cas. 874; Kaltenbach *v.* Lewis, 10 App. Cas. 617; Henderson *v.* McNally, 48 N. Y. App. Div. 134; Rice, &c. Co. *v.* Bank, 185 Ill. 422; Belfield *v.* National Supply Co., 189 Pa. St. 189.

[3] Borries *v.* Imperial Ottoman Bank, L. R. 9 C. P. 38.

[4] Ilsley *v.* Merriam, 7 Cush. (Mass.) 242; Evans *v.* Waln, 71 Pa. St. 69; Semenza *v.* Brinsley, 18 C. B. N. S. 467.

[5] Baxter *v.* Sherman, 73 Minn. 434; Miller *v.* Lea, 35 Md. 396; Cooke *v.* Eshelby, 12 App. Cas. 271. See criticism on this doctrine in 3 Law Q. Rev. 355; and see Hogan *v.* Shorb, 24 Wend. (N. Y.) 458, 462, and Wright *v.* Cabot, 89 N. Y. 570.

[6] Roosevelt *v.* Doherty, 129 Mass. 301.

[7] Warner *v.* M'Kay, 1 M. & W. 591; Hudson *v.* Granger, 5 B. & A. 27.

indicia of ownership of goods, and thus holds out the agent as owner, he is estopped as against those who deal with the agent as owner to set up his own claim or title.[1] So, in any case, where the principal has, by representing the agent to be the principal, or by standing by and allowing innocent third persons to deal with the agent as principal, induced such innocent third persons to change their legal relations in such a way as to make it inequitable for the principal to claim the rights of an undisclosed principal, he will be estopped from maintaining an action in his own name.[2] Perhaps this exception is only an extension of the previous one. In that the principal is estopped to press his rights to the extent that the third person would be injured; in this it is assumed that he cannot press his rights at all without injury to the third person.

§ 132. Third exception. — Exclusive credit to agent.

Where the third person has clearly expressed his intention to deal with the agent as principal, or where he has dealt with the agent on terms of trust and confidence, or the nature of the contract is fiduciary, the undisclosed principal cannot claim the benefits of the contract. "Every man has a right to elect what parties he will deal with. . . . And as a man's right to refuse to enter into a contract is absolute, he is not obliged to submit the validity of his reasons to a court or jury."[3] The intention to deal only with the agent may be found in the recitals of the written contract,[4] or the negotiations attending an oral one.[5] In the first case the question would be one of construction for the court; in the latter, of fact for the jury. The intention may be further inferred from the executory nature of the contract, or where it is fiduciary,

[1] *Post*, § 170.

[2] Ferrand *v.* Bischoffsheim, 4 C. B. N. S. 710, 716; Stebbins *v.* Walker, 46 Mich. 5; Pollock on Cont. (6th ed.) 98.

[3] Winchester *v.* Howard, 97 Mass. 303; Humble *v.* Hunter, 12 Q. B. 310. *Cf.* Boston Ice Co. *v.* Potter, 123 Mass. 28.

[4] Humble *v.* Hunter, *supra.*

[5] Winchester *v.* Howard, *supra.*

or for personal skill or service.[1] But in the latter case it would seem that if the agent has personally discharged the trust or performed the service, his undisclosed principal may recover the compensation.[2]

§ 133. Fourth exception. — Varying written instrument.

Where in a written instrument the agent has represented himself in express terms or recitals as the real and only principal, the undisclosed principal cannot maintain an action in his own name, since parol evidence would be inadmissible to vary the express terms and recitals of the written instrument or to deprive the third person of the benefit he contemplated from the character, credit, and substance of the one with whom he contracted.[3] This is the result of a rule of evidence merely. But where the real principal represents himself as agent for an undisclosed principal, he may afterwards assume his real character and sue as principal, since in such a case the third party has not relied upon the character, credit, or substance of any person other than the agent.[4]

§ 134. Fifth exception. — Sealed instrument.

Where a sealed instrument names the agent alone as the obligee, the principal cannot maintain an action upon it in his own name, owing to the technical rule that only the parties named or described in a sealed instrument can sue or be sued upon it.[5] He must proceed in the name of the agent.

§ 135. Sixth exception. — Negotiable instrument.

Only the party named as payee in a negotiable instrument can sue upon it.[6] This is due to the technical rule of the law

[1] Pollock on Cont. (6th ed.) 97; Eggleston *v.* Boardman, 37 Mich. 14; Kelly *v.* Thuey, 102 Mo. 522.

[2] Warder *v.* White, 14 Ill. App. 50, *citing* Grojan *v.* Wade, 2 Starkie, 443; King *v.* Batterson, 13 R. I. 117; Sullivan *v.* Shailer, 70 Conn. 733.

[3] Humble *v.* Hunter, 12 Q. B. 310; Darrow *v.* Horne Produce Co., 57 Fed. Rep. 463.

[4] Schmaltz *v.* Avery, 16 Q. B. 655.

[5] Shack *v.* Anthony, 1 M. & S. 573; Violett *v.* Powell, 10 B. Mon. (Ky.) 347; *post*, § 188.

[6] Cocke *v.* Dickens, 4 Yerg. (Tenn.) 29; **Grist *v.* Backhouse, 4 Dev.**

merchant which confines the rights and liabilities upon negotiable instruments to the parties named or described therein. But if there be any ambiguity on the face of the instrument as to who is intended to be the payee, parol evidence is admissible to remove the ambiguity. And, unlike the case of the maker, drawer, or acceptor, the addition of a descriptive term like "agent," "treasurer," "cashier," etc., is now generally held to create such an ambiguity.[1] The same reason does not exist for forbidding a person not named as payee to sue as for forbidding a person not named as payor to be sued, namely, that certainty is required as to the obligors on negotiable instruments in order that such instruments may circulate freely. Accordingly the technical rule forbidding an unnamed payee to sue has dwindled to narrow limits, and has in some cases been abandoned altogether.[2]

& Battle (N. C.), 362; Moore *v.* Penn, 5 Ala. 135; United States Bk. *v.* Lyman, 1 Blatchf. (U. S. C. C.) 297; s. c. 2 Fed. Cas. 709.

[1] Baldwin *v.* Bank, 1 Wall. (U. S.) 234; Commercial Bank *v.* French, 21 Pick. (Mass.) 486; Nichols *v.* Frothingham, 45 Me. 220; Nave *v.* First Nat. Bk., 87 Ind. 204.

[2] McConnell *v.* East Point Land Co., 100 Ga. 129; *post*, § 207.

CHAPTER XI.

ADMISSIONS AND DECLARATIONS OF THE AGENT.

§ 136. Object in proving admissions of agent.

The admissions or declarations of an agent may be sought to be offered in evidence against the principal for any one of three purposes: (1) To establish the fact of the agency; (2) to establish the nature or extent of the authority; (3) to establish the existence or non-existence of some fact (other than the two named above) which is material to the issue in controversy between the parties. The competency of the admission or declaration will depend in the first instance upon the purpose for which it is offered, and secondarily upon the relation of the admission or declaration to the transaction in question and the general scope of the agency. It is incompetent for either of the first two purposes named above, but may be competent for the third.

§ 137. When always inadmissible.

The admissions or declarations of an agent cannot be given in evidence against the principal, either (1) to establish the fact of the agency, or (2) to establish the nature or extent of the authority.[1] The reason is obvious. The declaration of the agent that he is agent, or that he has certain delegated powers, is merely an attempt to clothe himself with authority, and has no tendency to prove that he possesses in fact the authority which he claims. He is holding himself out as agent, whereas the requirement is that the principal should hold him out as agent in order to work an estoppel against the principal. It is therefore error to admit evidence of what the agent has said as to his own powers in an action to hold the principal, and the error is not cured by a charge to

[1] Hatch *v.* Squires, 11 Mich. 185; Howe Machine Co. *v.* Clark, 15 Kans. 492; Brigham *v.* Peters, 1 Gray (Mass.), 139; Mitchum *v.* Dunlap, 98 Mo. 418; Butler *v.* C., B. & Q. Ry. Co., 87 Iowa, 206.

the jury that the agency cannot be proved by the agent's own declarations, and it is even doubtful whether the withdrawing of such evidence from the consideration of the jury would cure the error.[1] Since his express declarations are incompetent to prove his authority, *a fortiori* his conduct is incompetent. It is therefore improper to charge a jury that they may find the fact of the agency or of the authority if the conduct of the agent was such as to lead the third party to believe that he was authorized.[2] It is the conduct of the principal and not of the agent from which authority must be inferred.

This is far from saying, however, that an agent is an incompetent witness to prove the fact of the agency or authority. Where parol evidence as to the existence of the agency or extent of the authority is admissible at all, the agent is as competent a witness as any other person to testify under oath to facts within his knowledge touching the agency.[3] Even the old rule of evidence which excluded the testimony of a party in interest made an exception in favor of the evidence of an agent produced to prove the fact of the agency.[4] And this applies equally where a husband is the agent of his wife or a wife of her husband.[5] But if the authority be conferred in writing, parol evidence of any kind is generally inadmissible,[6] unless it be where the question of authority is only incidentally involved.[7]

A confidential communication or report from the agent to his principal cannot be used as evidence against the principal by third persons.[8]

[1] Comegys *v.* American Lumber Co., 8 Wash. 661.

[2] Leu *v.* Mayer, 52 Kans. 419.

[3] Indianapolis Chair Mfg. Co. *v.* Swift, 132 Ind. 197; Rice *v.* Gove, 22 Pick. (Mass.) 158.

[4] 1 Greenleaf on Ev. § 416; Gould *v.* Norfolk Lead Co., 9 Cush. (Mass.) 338; Thayer *v.* Meeker, 86 Ill. 470.

[5] O'Conner *v.* Insurance Co., 31 Wis. 160; Roberts *v.* N. W. Nat. Ins. Co., 90 Wis. 210.

[6] Neal *v.* Patten, 40 Ga. 363.

[7] Columbia Bridge Co. *v.* Geisse, 38 N. J. L. 39.

[8] Langhorn *v.* Allnut, 4 Taunt. 511; *Re* Devala Provident, &c. Co., 22 Ch. Div. 593.

§ 138. When admissible. — General rule.

If the admission of the agent is offered in evidence to establish the existence or non-existence of some fact (other than that of the existence or extent of the agency), it is necessary, in order that the admission or declaration of the agent may be binding on his principal, that the following elements should concur: (1) the fact of the agency must be established; (2) the admission or declaration must be in regard to some matter within the scope of the agent's authority; (3) the admission or declaration must (*a*) constitute a part of the "*res gestæ*" of a transaction in which the agent was acting for his principal, and (*b*) serve to characterize that transaction.

The first two elements do not call for special discussion. They involve considerations already familiar to the reader. There must be an agency and the agent must be acting within the scope of his authority in order that any act of his may be binding on his principal. This is as true of his statements as of his conduct. If the admissions or declarations have reference to acts which the agent had no authority to perform, or to any matter foreign to the agency, they stand on the same level as statements of strangers and are clearly inadmissible.[1] But if the principal refers a third person to an agent for information concerning a particular matter the statements of the agent respecting such matter are evidence against the principal.[2]

§ 139. When admissible. — Res gestæ.

It is said that the declaration of an agent to be competent evidence against his principal must meet two requirements: (*a*) it must constitute a part of the *res gestæ* of a transaction in which the agent was acting for his principal; (*b*) it must

[1] 1 Greenleaf on Ev. § 113; Fairlie *v.* Hastings, 10 Ves. Jr. 123; Barnett *v.* South London Tram. Co., 18 Q. B. D. 815; Garth *v.* Howard, 8 Bing. 451; Fogg *v.* Pew, 10 Gray (Mass.), 409; Lamm *v.* Port Deposit, &c. Assn., 49 Md. 233.

[2] Williams *v.* Innes, 1 Camp. 364; Hood *v.* Reeve, 3 C. & P. 532.

be one which naturally accompanies the transaction and illustrates or unfolds its character or quality.[1]

(*a*) The first requirement is briefly stated in the familiar rule that the declaration must constitute a part of the *res gestæ*. This merely means that what an agent says or does in the conduct of a transaction for his principal is treated as if it had been said or done by the principal, under the application of the fiction of identity. The term *res gestæ* is simply a convenient symbol for conveying this idea. It really adds nothing, and, because of its literal vagueness and its somewhat different use in other branches of the law, has led to some darkening of counsel. If the phrase "of the *res gestæ*" were omitted from the first sentence in this section, the idea conveyed would be precisely the same.

The first inquiry is, therefore, whether the declaration was made as part of a transaction in which the agent was acting for the principal. If made before or after the transaction, it is incompetent as against the principal.[2] This is stated very clearly in the leading case of *White* v. *Miller*:[3]

"The general rule is, that what one person says, out of court, is not admissible to charge or bind another. The exception is in cases of agency; and in cases of agency, the declarations of the agent are not competent to charge the principal upon proof merely that the relation of principal and agent existed when the declarations were made. It must further appear that the agent, at the time the declarations were made, was engaged in executing the authority conferred upon him, and that the declarations related to, and were connected with the business then depending, so that they constituted a part of *res gestæ*."[4]

In the application of this rule the courts have not been entirely harmonious in deciding when the declaration is a

[1] White *v.* Miller, 71 N. Y. 118, 134; Butler *v.* Manhattan Ry. Co., 143 N. Y. 417, 422.

[2] Great W. Ry. *v.* Willis, 18 C. B. N. S. 748; Haven *v.* Brown, 7 Me. 421.

[3] 71 N. Y. 118, 135.

[4] See also Fairlie *v.* Hastings, 10 Ves. Jr. 123.

part of the transaction. Clearly a subsequent narration by the agent is not.[1] Clearly a contemporaneous statement by way of inducement or representation is.[2] In contract cases there seems to be little difficulty in deciding whether the declaration falls within the first or the second of these classes, for the moment of the formation or completion of the contract marks the termination of the transaction.[3] Yet even in such cases admissions may be made, subsequent to the formation of the contract but relating to it, which will be proper evidence against the principal provided the agent in making the admissions was still within the ordinary course of his employment or duties. Thus the statement of a station agent to the police that he believes another servant has absconded with a parcel delivered for carriage at that station is admissible.[4] So the acknowledgment of an agent in charge of a business that a certain sum is due for goods bought in the course of that business is admissible in order to charge the principal or to take a case out of the Statute of Limitations.[5] It would seem logical to say that whenever an admission or statement is made by an agent within his ostensible authority and operates to mislead a third person, or to cause him to act, or refrain from acting, to his prejudice, the

[1] Great W. Ry. *v.* Willis, 18 C. B. N. S. 748; Stiles *v.* Western R., 8 Met. (Mass.) 44; Phelps *v.* James, 86 Iowa, 398; Empire Mill Co. *v.* Lovell, 77 Iowa, 100; White *v.* Miller, *supra;* Fairlie *v.* Hastings, *supra.*

[2] Peto *v.* Hague, 5 Esp. 134; Baring *v.* Clark, 19 Pick. (Mass.) 220; Dick *v.* Cooper, 24 Pa. St. 217; Burnside *v.* Grand Trunk Ry., 47 N. H. 554.

[3] Declarations in the course of a transaction amounting to warranties or to fraud may be distinguished. In such cases the warranty or the fraud is the main fact to be established. See, for example, Nelson *v.* Cowing, 6 Hill (N. Y.), 336; Jeffrey *v.* Bigelow, 13 Wend. (N. Y.) 518; Smalley *v.* Morris, 157 Pa. St. 349. Declarations which are authorized are also to be distinguished, as where two persons converse by telephone through the agency of a telephone operator. Oskamp *v.* Gadsden, 35 Neb. 7.

[4] Kirkstall Brewery Co. *v.* Furness Ry., L. R. 9 Q. B. 468. See also Morse *v.* Conn. Riv. R., 6 Gray (Mass.), 450; St. Louis, &c. R. *v.* Weaver, 35 Kans. 412.

[5] Anderson *v.* Sanderson, Holt N. P. 591; Clifford *v.* Burton, 1 Bing. 199; Burt *v.* Palmer, 5 Esp. 145; Webb *v.* Smith, 6 Colo. 365.

principal should be bound by such admission or statement in accordance with the usual doctrines of estoppel.[1] But where no doctrine of estoppel can be invoked, then the question is narrowed to one of evidence merely, and the inquiry is whether the declaration constitutes a part of an authorized transaction then pending, and is therefore a part of the *res gestæ* of that transaction.[2]

In cases of pure tort in which no doctrine of estoppel is applicable, that is, in cases of declarations by servants adverse to their masters' interests, the question is more difficult and more confused, because it is ordinarily no part of the duty of servants to make declarations or admissions for their masters. Yet the courts have admitted declarations of servants made in connection with such torts, where the servant's declaration or admission is closely connected with his tortious act or omission and serves to characterize it. How closely the declaration must be connected in point of time with the act or omission in order to be admissible as against the principal is uncertain. The courts have shifted the line in accordance with the peculiar circumstances of each case, and their interpretation of the general rule. The test is that the declaration must be in such close connection with the act or omission constituting the tort as to be clearly spontaneous and undesigned, leaving no opportunity for the playing of a part or the invention of explanations or excuses. If strictly contemporaneous, the declaration is admissible.[3] If unquestionably subsequent both as to time and causal relation, the declaration is inadmissible.[4] If in point of time subsequent, but in point of causal relation to the main act substantially contemporaneous, the declaration will be admitted by some courts and rejected by others. One class of cases holds that if the

[1] *Ante*, §§ 102–103.

[2] Loomis *v.* New York &c. R., 159 Mass. 39.

[3] Elledge *v.* Ry. Co., 100 Cal. 282; Bigley *v.* Williams, 80 Pa. St. 107.

[4] Williamson *v.* Cambridge R., 144 Mass. 148; Luby *v.* Hudson Riv. R., 17 N. Y. 131; Packet Co. *v.* Clough, 20 Wall. (U. S.) 528; Worden *v.* Humeston, &c. R. Co., 72 Iowa, 201.

declaration is clearly the result of the main act alone, and not of that plus possible reflection on the part of the agent or servant, it is admissible; another class rejects this doctrine as too refined for practical application, and holds to the rule requiring a proximity in time, which might properly be described as instantaneously successive. This difference of judicial opinion is well illustrated in *Vicksburg, &c. Railroad Co.* v. *O'Brien*,[1] the Supreme Court of the United States standing five to four against the admission of the declaration of a locomotive engineer made from ten to twenty minutes after an accident. The minority dissented on the ground that the modern cases have relaxed the stringency of the rule requiring "perfect coincidence" of time. Perhaps the weight of American authority favors such relaxation, guarded by the qualification that the peculiar facts of each case must determine whether the declaration is undesigned and spontaneous.[2]

(*b*) The second requirement is that the declaration should be one which illustrates or unfolds the character or quality of the main act. "While proximity in point of time with the act causing the injury is in every case of this kind essential to make what was said by a third person [agent], competent evidence against another [principal] as part of the *res gestæ*, that alone is insufficient, unless what was said may be considered part of the principal fact, and so a part of the act itself. But as in this case the . . . [remark] was not one naturally accompanying the act, or calculated to unfold its character or quality, it was not admissible as *res gestæ*. . . . *Res gestæ* in a case like this implies substantial coincidence in time, but if declarations of third persons are not in their nature a part of the fact, they are not admissible in evidence, however closely related in point of time."[3]

[1] 119 U. S. 99.

[2] Alabama, &c. R. *v.* Hawk, 72 Ala. 112; Ohio, &c. Ry. *v.* Stein, 133 Ind. 243; Harriman *v.* Stowe, 57 Mo. 93; Hermes *v.* Chicago, &c. Ry., 80 Wis. 590.

[3] Butler *v.* Manhattan Ry. Co., 143 N. Y. 417, 423; Barker *v.* St. Louis, &c. R., 126 Mo. 143.

§ 140. Limitation of the rule. — Adverse interest.

A qualification of the above rule exists in cases where the agent is known to be acting for himself, or to have an adverse interest. Where, for example, the president of a company pledges the stock of the company for a personal loan, his representations as to its genuineness do not bind the company. The pledgee should know in such a case that the agent's personal interest may lead him to betray his principal. "It is an old doctrine, from which there has never been any departure, that an agent cannot bind his principal, even in matters touching his agency, where he is known to be acting for himself, or to have an adverse interest."[1]

[1] Manhattan Life Ins. Co. *v.* Forty-second Street, &c. R., 139 N. Y. 146.

CHAPTER XII.

NOTICE TO AGENT.

§ 141. General statement of the rule.

It is a general statement of the law that notice to the agent in the course of his employment, and of such a nature that it becomes his duty to communicate it to his principal, is notice to the principal. In other words, the principal is chargeable with notice of all the material facts that come to the knowledge of his agent in a transaction in which the agent is acting for the principal.[1] If this were not so a purchaser could always free himself from the possible equities arising from the acquisition of knowledge of adverse rights in or to the property purchased, by purchasing through an agent.[2] It is against the policy of the law to place one who deals through an agent in a better position than one who deals in person.[3]

But the rule has a wider sweep than this. One who deals through an agent may be placed in a worse position than one who deals in person. By the application of the fiction of identity all the knowledge present in the mind of the agent, whenever or however acquired, may be treated as the knowledge of the principal. In other words, if P employs A, and it happens that A possesses information affecting the transaction, P will be charged with this knowledge; whereas, if P employs B, who happens not to possess such information, P will not be charged with notice.

The subject of notice has, therefore, two branches: (1) where the notice is acquired by the agent in the course of the transaction in respect of which it is invoked; (2) where the notice is acquired by the agent outside of the transaction

[1] The Distilled Spirits, 11 Wall. (U. S.) 356; Hyatt *v.* Clark, 118 N. Y. 563.

[2] Sheldon *v.* Cox, Amb. 624.

[3] Kennedy *v.* Green, 3 Myl. & K. 699.

in respect of which it is invoked, either (*a*) while he is agent, or (*b*) before the agency begins.

§ 142. Notice acquired during the transaction.

All the authorities agree that notice acquired by the agent in the course of the transaction which it affects, is notice to the principal. "The rule that notice to the agent is constructive notice to the principal, is based on the presumption that the agent has communicated to the principal the facts connected with the subject-matter of his agency which came to his notice. . . . Where others than the principal and agent are concerned, the presumption that the agent has discharged his duty to his principal in communicating facts of which he has notice, is as conclusive as the presumption that the principal remembers the facts brought home to him personally." [1]

It therefore follows that as to notice acquired by the agent in the course of the transaction in respect of which the notice is invoked, the principal is bound as fully as if he acquired the notice in person, and whether the agent remembered the fact at the final conclusion of the transaction or not.[2]

But if an agent is employed for a particular purpose, and does not accomplish it, and subsequently another agent is employed for the same purpose, and does accomplish it, notice to the first agent, not communicated to the principal or to the second agent, does not affect the transaction.[3] So also if an agent acquires notice in a transaction wholly foreign to the one in question, his principal is not estopped within the rule now under consideration.[4]

§ 143. Notice acquired outside of transaction but in general scope of agency.

A distinction must be drawn between an agent, like an attorney, who acts for his principal in totally different trans-

[1] Bierce *v.* Red Bluff Hotel Co., 31 Cal. 160, 166.

[2] Hiern *v.* Mill, 13 Ves. 114; Blackburn *v.* Haslam, 21 Q. B. D. 144; Bawden *v.* London, &c. Co., 1892, 2 Q. B. 534; Suit *v.* Woodhall, 113 Mass. 391; Hill *v.* North, 34 Vt. 604.

[3] Blackburn *v.* Vigors, 12 App. Cas. 531; Irvine *v.* Grady, 85 Tex. 120.

[4] Tate *v.* Hyslop, 15 Q. B. D. 368; Union N. B. *v.* German Ins. Co., 71 Fed. Rep. 473.

actions, perhaps separated by a considerable period of time, and an agent, like a bank cashier or a general manager, who is engaged in a continuous series of transactions, all incidents of the conduct of a general business.

As to the first, it is believed that the rule as to notice is the same as in the case where the notice is acquired before the agency begins.

As to the second, the rule as established by many of the courts is the same as in the case of notice acquired in the particular transaction. "The general rule is well established that notice to an agent of a bank, or other corporation, entrusted with the management of its business, or of a particular branch of its business, is notice to the corporation, in transactions conducted by such agent, acting for the corporation, within the scope of his authority, whether the knowledge of such agent was acquired in the course of the particular dealing, or on some prior occasion."[1] "Where the agency is continuous, and concerned with a business made up of a long series of transactions of a like nature, of the same general character, it will be held that knowledge acquired as agent in that business in any one or more of the transactions, making up from time to time the whole business of the principal, is notice to the agent and to the principal, which will affect the latter in any other of those transactions in which that agent is engaged, in which that knowledge is material."[2]

§ 144. Notice acquired before agency begins.

There are two views as to the effect of notice acquired by the agent before the agency begins. It is believed that notice acquired by the agent in a prior disconnected agency for the same principal is to be treated as notice acquired before the agency begins.

(1) The first view is that the principal is never to be charged with notice of any fact learned by the agent before the agency begins. This rests upon the notion that the

[1] Cragie *v.* Hadley, 99 N. Y. 131, 134.

[2] Holden *v.* New York and Erie Bank, 72 N. Y. 286, 292.

identity of the principal and agent exists only during the time the agency exists. "The true reason of the limitation is a technical one, that it is only during the agency that the agent represents, and stands in the shoes of his principal. Notice to him then is notice to his principal. Notice to him twenty-four hours before the relation commenced is no more notice than twenty-four hours after it had ceased would be."[1]

(2) The second view is that notice acquired by an agent before the agency begins is notice to the principal, *provided* that the fact is present in the mind of the agent at the time of the transaction as to which the notice is invoked, and *provided* that the agent is at liberty to disclose it.[2] The qualifications to the rule are important. It must be shown that the agent remembered the fact in question — had it present in his mind — at the time he was acting for the principal; in the absence of such proof the knowledge will not be imputed to the principal.[3] Some cases hold that "if the agent acquires his information so recently as to make it incredible that he should have forgotten it, his principal will be bound."[4] It must also appear that he was at liberty to disclose it, that is, that he would not be violating his duty to another principal in so doing.[5] And it appears that the burden is upon the one alleging the notice to establish these facts.[6]

§ 145. General qualifications.

There are two general qualifications which must be considered in connection with the general rule of notice.

(1) The fact constituting the notice must have a material

[1] Houseman *v.* Girard, &c. Ass'n, 81 Pa. St. 256, 262; McCormick *v.* Joseph, 83 Ala. 401; Satterfield *v.* Malone, 35 Fed. Rep. (Penn. Circuit) 445.

[2] The Distilled Spirits, 11 Wall. (U. S.) 356; Fairfield Savings Bank *v.* Chase, 72 Me. 226; Lebanon Savings Bank *v.* Hollenbeck, 29 Minn. 322; Burton *v.* Perry, 146 Ill. 71; Shafer *v.* Phœnix Ins. Co., 53 Wis. 361; Dresser *v.* Norwood, 17 C. B. N. S. 466.

[3] Constant *v.* University of Rochester, 111 N. Y. 604.

[4] Brothers *v.* Bank, 84 Wis. 381, 395.

[5] Constant *v.* University, *supra*.

[6] *Ibid.*

bearing upon the subject-matter within the scope of the agency. It is not enough that it has a material bearing upon the subject-matter outside the scope of the agency. An agent may be given only a very limited and special power over the subject-matter, and the fact in question may have no bearing upon the exercise of that power. In that case the knowledge of the agent would not be imputed to the principal. "The knowledge or notice must come to an agent who has authority to deal in reference to those matters which the knowledge or notice affects. The facts of which the agent had notice must be within the scope of the agency, so that it becomes his duty to act upon them or communicate them to his principal. As it is the rule that whether the principal is bound by contracts entered into by the agent depends upon the nature and extent of the agency, so does the effect upon the principal of notice to the agent depend upon the same conditions." [1]

(2) It can never be reasonably inferred that an agent will communicate his knowledge to his principal where it is clearly against his own interest to do so.[2] Accordingly a principal is not bound by notice acquired by his agent in a transaction where the agent is acting adversely to his principal,[3] or has colluded with third persons to defraud his principal.[4] This is analogous to the case where an agent commits a wilful tort for his own purposes, and not as a means of performing the business entrusted to him.[5]

§ 146. Application of rule to corporations.

The general rule that notice to an agent acting within the scope of his authority and in regard to the subject-matter of the agency, is notice to the principal, applies to corporations as well as to individual principals.[6] Indeed, it is probably in

[1] Trentor *v.* Pothen, 46 Minn. 298; Pittman *v.* Sofley, 64 Ill. 155.

[2] Cave *v.* Cave, 15 Ch. Div. 639; Barnes *v.* Trenton Gas Light Co., 27 N. J. Eq. 33; Innerarity *v.* Merchants' Nat. Bk., 139 Mass. 332.

[3] Frenkel *v.* Hudson, 82 Ala. 158.

[4] Western Mortg. & Invest. Co. *v.* Ganzer, 63 Fed. Rep. 647; Hudson *v.* Randolph, 66 Fed. Rep. 216; Nat. L. Ins. Co. *v.* Minch, 53 N. Y. 144.

[5] Allen *v.* South Boston R., 150 Mass. 200. *Cf.* Bank *v.* American Dock & Trust Co., 143 N. Y. 559.

[6] Story on Agency, § 140 *a*; Duncan *v.* Jaudon, 15 Wall. (U. S.) 165;

reference to corporations that the rule is most frequently invoked, for as is said in one case: "A corporation cannot see or know anything except by the eyes or intelligence of its officers."[1] Generally speaking, however, its application to both individuals and corporations is governed by the same limitations, and it is therefore only necessary to note, in this section, that subject to a few exceptions, notice to either a stockholder[2] or a single director[3] of a corporation is not regarded as notice to the corporation. But if the director acts as a member of the board in passing upon the matter concerning which he has notice, the corporation is charged with his knowledge. "If the note is discounted by a bank, the mere fact that one of the directors knew the fraud or illegality will not prevent the bank from recovering; but if the director who has such knowledge acts for the bank, in discounting the note, his act is the act of the bank, and the bank is affected with his knowledge."[4] But if "the officer who has such knowledge has also such connection with or interest in the subject-matter of the transaction as to raise the presumption that he would not communicate the fact in controversy, there is no imputation of notice to the corporation."[5]

§ 147. Notice of sub-agent.

Does notice to a sub-agent stand upon the same footing as notice to an agent? The question was fully discussed in the leading case of *Hoover* v. *Wise*,[6] and the decision reached by a divided court was that if the agent has power to appoint a

Union Gold Min. Co. *v.* Rocky Mt. N. B., 2 Colo. 248; Smith *v.* Water Comm., 38 Conn. 208.

[1] Factors, &c. Co. *v.* Maine Dry Dock, &c. Co., 31 La. An. 149.

[2] Housatonic Bk. *v.* Martin, 1 Metc. (Mass.) 294; Union Canal Co. *v.* Loyd, 4 W. & S. (Penn.) 393.

[3] Powles *v.* Page, 3 C. B. 16; Westfield Bank *v.* Cornen, 37 N. Y. 320; Fairfield Sav. Bk. *v.* Chase, 72 Me. 226; Farrel Foundry Co. *v.* Dart, 26 Conn. 376.

[4] Bank *v.* Cushman, 121 Mass. 490. See also U. S. Bank *v.* Davis, 2 Hill (N. Y.), 451; Union Bank *v.* Campbell, 4 Humph. (Tenn.) 394.

[5] Hatch *v.* Ferguson, 66 Fed. Rep. 668; Innerarity *v.* Bank, 139 Mass. 332.

[6] 91 U. S. 308.

sub-agent notice given to the sub-agent is notice to the principal, but if the agent has not power to appoint a sub-agent then notice to the sub-agent is not notice to the principal. The dissent in this case was, perhaps, rather on the ground that the agent had authority to appoint the sub-agent than that the rule of law enunciated by the majority was incorrect. The case is a typical one. A principal employs an agent to make a collection or to transact some other business which may require the assistance of an attorney at law. The agent employs an attorney, and the notice with which the principal is sought to be charged is given to or acquired by the attorney. *Hoover* v. *Wise* holds that this is not notice to the principal since the attorney is the agent of the agent and not of the principal. As Mr. Justice Miller points out in a dissenting opinion, "the effect of the decision is, that a non-resident creditor, by sending his claim to a lawyer through some indirect agency, may secure all the advantages of priority and preference which the attorney can obtain of the debtor, well knowing his insolvency, without any responsibility under the Bankrupt Law." The view taken in this case by the majority has not generally prevailed. It may be said to be the general rule that, where the business confided to the agent reasonably contemplates that the assistance of an attorney at law may be required, the agent has authority to appoint an attorney, and notice to the attorney will be notice to the principal.[1] So if, by custom, as in the case of insurance agencies, it is usual to appoint sub-agents, notice to such a sub-agent will be notice to the principal.[2]

[1] Bates *v.* American Mortgage Co., 37 S. C. 88; Davis *v.* Waterman, 10 Vt. 526; Ryan *v.* Tudor, 31 Kans. 366.

[2] Arff *v.* Star Fire Ins. Co., 125 N. Y. 57; Carpenter *v.* German Am. Ins. Co., 135 N. Y. 298.

CHAPTER XIII.

TORTS, FRAUDS, AND MISREPRESENTATIONS OF AGENT.

1. *Constituent's Liability for Torts of Representative.*

§ 148. Distinction between servant's torts and agent's torts.

A representative may render his constituent liable in tort for the breach of an antecedent obligation fixed by the law.[1] Such breach gives rise to an action *ex delicto* for damages.

Torts are the chief subject-matter of the law of master and servant. A servant is employed to perform mechanical or operative acts for his master. While so engaged he may negligently or wilfully injure third persons. In such case it is held that the master is liable for every wrong committed by the servant in the course of the employment and for the master's benefit.[2] And it is immaterial whether the master authorized or directed the act; the first inquiry is whether it was within the course of the employment, and a secondary inquiry may be whether it was for the master's benefit. "This rule is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it," [3] that is, he shall answer for it under those circumstances where the injury, if committed in person, would constitute a breach of legal duty.

[1] For a discussion of the meaning and definition of "tort," see Bigelow on Torts (7th ed.), pp. 1–30.

[2] Pollock on Torts (5th ed.), p. 72 *et seq.*; Bigelow on Torts (7th ed.), §§ 79–82.

[3] Farwell *v.* Boston, &c. R., 4 Metc. (Mass.) 49.

Contract is the chief subject-matter of the law of principal and agent because an agent is employed mainly to influence third persons to enter into new legal relations with the principal. But an agent may have authority, real or ostensible, to make representations to third persons which when acted upon involve the principal in a tort liability. Accordingly we have to discuss here such torts as may be committed by an agent as agent, namely, torts arising from representations made by the agent to a third person in order to induce him to act. These torts differ from those committed by a servant in this, that a servant injures a person by acting upon him or his property, while an agent injures a person by inducing the injured person to act to his own prejudice; and this the agent does by making representations calculated to influence the conduct of the injured person.

§ 149. Basis of master's and of principal's liability for tort.

A master's liability for the torts of his servant rests upon no well-defined legal principles. It is clear that what he commands he should be answerable for. It is now settled that he may ratify a tort and become answerable therefor, although a learned judge has recently said, — "If we were contriving a new code to-day, we might hesitate to say that a man could make himself a party to a bare tort, in any case, merely by assenting to it after it had been committed."[1] But as to why he is liable for a tort which he neither commanded nor ratified, it is difficult to explain. The whole matter must be referred to grounds of social utility. A master is answerable because the servant is about the master's business, and it is, on the whole, better that the master should suffer for defaults in the conduct of the business, than that innocent third persons should bear the losses that such defaults cast upon them.[2] Whatever the reason, the rule is established that the master is liable for all torts committed by his servant in the course of the employment and for the

[1] Mr. Justice Holmes in Dempsey *v.* Chambers, 154 Mass. 330.

[2] See Pollock on Torts (5th ed.) pp. 72–74.

master's benefit, and in some cases even when the tort was committed for the agent's own purposes.[1]

Many cases dealing with the liability of a principal for an agent's torts, and even for misrepresentations not amounting to tort, have sought to apply the same rule as in the case of master and servant.[2] But when it is remembered that an agent commits a tort only by making a representation, it will be perceived that the liability of the principal may be made to rest upon grounds more solid, or at least more certain, than those sustaining the liability of a master for a servant's torts. We need only inquire (1) did the principal hold the agent out as having authority to make the representation, and (2) where the third person has been induced to act to his own prejudice, did the third person act relying reasonably upon the ostensible authority of the agent and the representations which he made? In other words we may solve the problem of the liability of the principal for his agent's representations upon the same reasoning as that employed in solving the problem of the liability of the principal for the contracts of his agent.[3] A principal is responsible for every such representation of his agent as is made within the scope of the authority, that is, as he leads third persons reasonably to believe that the agent possesses the authority to make.[4] The liability of a principal for his agent's torts is therefore referred to the doctrine of estoppel. It is the "scope of the authority" and not the "course of the employment" that is the test. An agent may have real or ostensible authority to make representations. A servant may have real, but cannot have ostensible, authority to commit torts. The doctrine of

[1] See this more fully discussed in Book II. under the head of "Master and Servant;" *post*, § 242 *et seq.*

[2] Udell *v.* Atherton, 7 H. & N. 172; Barwick *v.* English Joint Stock Co., L. R. 2 Ex. 259; British Mutual Banking Co. *v.* Charnwood Forest Ry. Co., 18 Q. B. D. 714; Friedlander *v.* Texas, &c. Ry., 130 U. S. 416; Griswold *v.* Haven, 25 N. Y. 595, 600; *ante*, § 52 a.

[3] *Ante*, §§ 102–103, 106.

[4] New York & N. H. R. *v.* Schuyler, 34 N. Y. 30; Armour *v.* Mich. Cent. R., 65 N. Y. 111; Bank of Batavia *v.* New York, &c. R., 106 N. Y. 195; Fifth Ave. Bank *v.* Forty-Second St., &c. Co., 137 N. Y. 231.

estoppel is sufficient to determine the liability of a principal for an agent's torts; it can have no application to the liability of a master for a servant's torts.

There are cases in which the master may be estopped to deny that the wrong-doer is his servant, as where he represents that he is practising a profession and thereby induces third persons to be operated upon by one held out as his skilled assistant.[1] But this is estoppel to deny the existence of the relation merely. The liability for a tort committed by such ostensible servant is fixed by the ordinary rule applicable to master and servant. Estoppel to deny the existence of the relation could not be invoked where the third person is not thereby induced to change his legal relations or position.[2]

§ 150. Nature of third person's remedies.

The person injured by a misrepresentation upon which he relies to his damage may proceed in tort for deceit where the misrepresentation was made with knowledge of its falsity or with a reckless disregard of its truth or falsity. If, however, the misrepresentation was made innocently, that is, with a belief in its truth, no action in tort will lie.[3]

Misrepresentation may, however, give the injured party a right to rescind a contract[4] or it may work an estoppel.[5] In equity there is also a right of restitution which is very similar to the common law action for damages.[6] Misrepresentation is also a defence to an action for specific performance in equity.

In the sections which follow, we shall first consider the effect of misrepresentation by an agent in giving rise to an action in tort for deceit, and shall then consider other aspects

[1] Hannon *v.* Siegel-Cooper Co., 167 N. Y. 244.

[2] Smith *v.* Bailey, 1891, 2 Q. B. 403.

[3] Bigelow on Tort (7th ed.), §§ 139–144; Derry *v.* Peek, 14 App. Cas. 337.

[4] Redgrave *v.* Hurd, 20 Ch. Div. 1.

[5] Huffcut's Anson on Cont. pp. 199–203; Ewart on Estoppel, pp. 222–237.

[6] Ewart on Estoppel, pp. 222, 225.

of the question whether the particular remedy sought be in tort, in contract, or by way of estoppel.

2. *Liability for Frauds and Misrepresentations of Agent.*

§ 151. Fraud and misrepresentation generally.

Fraud is a term in the law of rather vague meaning. It is often used to include: (1) misrepresentations which amount to deceit and are remediable in an action for damages; (2) misrepresentations which, whether amounting to deceit or not, are either made terms in contracts or constitute inducements to entering into contracts.[1] Strictly the term fraud might well be confined to misrepresentations which constitute actionable deceit, while the term misrepresentation might be used to designate those cases where there could be no action for deceit, but the misrepresentation is either a term in the contract or an inducement to entering into it. Fraud then might have these results: first, it might give rise to an action for deceit; second, it might vitiate a contract; third, it might work an estoppel. Misrepresentation might vitiate a contract or work an estoppel, but it could not give rise to an action for deceit.

Two main problems confront us in discussing the liability of a principal for the frauds of his agent: (1) is a personally innocent principal liable in deceit for the wilful frauds of his agent; (2) is a principal liable in any form for the frauds of an agent not committed for the principal's benefit?

§ 152. Fraud in relation to agency: deceit.

Deceit, considered as a tort for which an action for damages will lie, consists of a false representation of a material fact, made with knowledge of its falsity or with a reckless disregard of whether it is true or false, and made with intent that it should be acted upon by another, who, reasonably relying upon the representation, does act upon it to his damage.[2]

A principal is liable in deceit for such a false representation made by his agent when the agent has actual authority to

[1] Huffcut's Anson on Cont. pp. 174–183.

[2] Bigelow on Torts (7th ed.), § 110; Pollock on Torts (5th ed.), pp. 269, 270.

make the representation, when the principal ratifies the deceit, or when the principal is estopped to deny that the agent has authority to make the representation.[1]

The chief difficulty in proceeding against a principal for the deceit of his agent arises in connection with the rule that one in order to be liable for deceit must have made the representation with knowledge of its falsity or with reckless ignorance of its truth or falsity. The question arises, is a personally innocent principal liable for the fraud of his agent? These possible cases may be put: —

(1) The principal knows the representation to be false and authorizes the agent to make it. In such a case the principal is liable, and the knowledge or want of knowledge of the agent is immaterial, although it would become material in an action against the agent for deceit.[2]

(2) The principal knows the contrary of the representation to be true, but does not expressly authorize the agent to make any representation concerning the matter. (*a*) If the agent knows the representation to be false, or makes it recklessly in ignorance of its truth or falsity, the principal is liable provided the agent has such ostensible authority to make a representation concerning the matter as to lead third persons to give it credit and act upon it.[3] (*b*) Even if the agent believes the representation to be true, it is thought that the principal should be liable, provided the agent has ostensible authority to make such a representation, since the principal holds out the agent as authorized to make a representation in his behalf and should not be permitted, as against an innocent party, to plead that he did not give his agent all necessary information within his own knowledge.[4] The leading case on this is *Cornfoot* v. *Fowke*,[5] in which an agent represented that

[1] Hern *v.* Nichols, 1 Salk. 289; Grammar *v.* Nixon, 1 Stra. 653.

[2] Pollock on Torts (5th ed.), pp. 290–291.

[3] Taylor *v.* Green, 8 C. & P. 316; Parke, B., in Cornfoot *v.* Fowke, 6 M. & W. 358, 373.

[4] Pollock on Torts (5th ed.), p. 291; Ludgater *v.* Love, 44 L. T. R. 694; Mayer *v.* Dean, 115 N. Y. 556.

[5] 6 M. & W. 358.

there was no objection to a house he was authorized to let, whereas, unknown to him but known to his principal, there was a brothel next door. In an action for rent the hirer pleaded this fraud as a defence. It was held that the plea was bad, although it would have been good if the principal were shown to have intentionally concealed the circumstance from his agent.[1] In *Fuller* v. *Wilson*,[2] an agent employed to sell a house represented it to be free from taxes, whereas, known to his principal but unknown to him, it was subject to taxes. It was held that the principal was liable in deceit.

(3) The principal has no knowledge or true belief concerning the matter, and does not expressly authorize any representation to be made concerning it. (*a*) If the agent knows his representation to be false, the principal is liable provided the agent had ostensible authority to make such a representation.[3] (*b*) If the agent is also consciously ignorant of the truth or falsity, the principal should be liable, since reckless statements are equivalent to intentionally deceitful ones.

(4) The principal believes the facts to be as the agent represented them to be. (*a*) If the agent knows his representation to be false, the principal is liable, provided he had actual or ostensible authority to make such representations.[4] (*b*) If the agent also believes his representations to be true,

[1] "In Cornfoot *v.* Fowke, it is difficult to suppose that as a matter of fact the agent's assertion can have been otherwise than reckless; what was actually decided was that it was misdirection to tell the jury without qualification 'that the representation made by the agent must have the same effect as if made by the plaintiff himself;' the defendant's plea averring fraud without qualifiation." Pollock on Torts (5th ed.), p. 291, *note*. See criticism of this case in Fitzsimmons *v.* Joslin, 21 Vt. 129, 140–142; National Exchange Co. *v.* Drew, 2 Macq. 103; Ludgater *v.* Love, 44 L. T. R. 694.

[2] 3 Q. B. 58. Reversed on other grounds on appeal, 3 Q. B. 68, 1009.

[3] Udell *v.* Atherton, 7 H. & N. 172 (court equally divided); Barwick *v.* English Joint Stock Bank, L. R. 2 Ex. 259; Mackay *v.* Commercial Bank, L. R. 5 P. C. 394; Swire *v.* Francis, 3 App. Cas. 106; Houldsworth *v.* Glasgow Bank, 5 App. Cas. 317; Indianapolis, &c. Ry. *v.* Tyng 63 N. Y. 653; City N. B. *v.* Dun, 51 Fed. Rep. 160.

[4] Pollock on Torts (5th ed.), pp. 293–294.

the principal is not liable, since neither principal nor agent has been guilty of any intent to deceive, or of a reckless disregard of the consequences of the representation.

It will be observed that deceit may be proved by showing either that the principal and agent were both guilty of fraud, or by showing that the principal was guilty of fraud, or by showing that the agent was guilty of fraud while acting within the scope of his authority. If both principal and agent were innocent of fraud, then no action for deceit will lie.

The idea has been put forward that a personally innocent principal cannot be held liable in tort for deceit.[1] But that idea has not met with favor, and it now seems reasonably clear that the personally innocent principal is liable in tort for deceit, if his agent, while acting within the scope of his authority, makes a deceitful representation knowing it to be false, or consciously ignorant of its truth or falsity.[2]

Under statutes authorizing an arrest in case of fraud in contracting debt, it is held that a personally innocent principal cannot be arrested for the fraud of his agent.[3]

§ 153. Fraud or misrepresentation for benefit of principal.

Leaving aside now the question as to the particular form of the remedy, we have to consider whether, in order to give any remedy at all against the principal, the misrepresentation of the agent must be made for the principal's benefit.

In the case of fraud committed by the agent within the scope of his authority, and for the benefit of the principal, it is now generally conceded that the principal is liable however innocent he may have been personally.[4] Thus, if the agent is

[1] Udell *v.* Atherton, 7 H. & N. 172; Western Bank *v.* Addie, L. R. 1 Sc. & D. Cas. 145; Kennedy *v.* McKay, 43 N. J. L. 288; State *v.* Fredericks, 47 N. J. L. 469; Keefe *v.* Sholl, 181 Pa. St. 90.

[2] Barwick *v.* English Joint Stock Bank, L. R. 2 Ex. 259; Jeffrey *v.* Bigelow, 13 Wend. (N Y.) 518; White *v.* Sawyer, 16 Gray (Mass.), 586; City Nat. Bank *v.* Dun, 51 Fed. Rep. 160; Peebles *v.* Patapsco Guano Co., 77 N. C. 233; Wolfe *v.* Pugh, 101 Ind. 293, 303–306.

[3] Hathaway *v.* Johnson, 55 N. Y. 93.

[4] Barwick *v.* English Joint Stock Bank, L. R. 2 Ex. 259; Jeffrey *v.* Bigelow, 13 Wend. (N. Y.) 518; Peebles *v.* Patapsco Guano Co., 77 N. C. 233;

authorized to sell lands and makes false representations while so selling them, the principal is liable to the purchaser for damages suffered in consequence of such false representations.[1] "When a principal authorizes an agent to do a certain thing, he is answerable for and bound by the acts and representations of the agent in accomplishing that end, even though the agent is guilty of fraud in bringing about the result. Having given such authority, the principal is responsible for the fraudulent as well as the fair means used by the agent, if they are in the line of accomplishing the object of the agency." [2]

In any case where the principal has in his hands the fruits of a contract made by his agent through misrepresentation or fraud, it is clear that the misrepresentation was for the principal's benefit and he remains responsible for the consequences.[3] Duress stands in this respect upon the same footing as misrepresentation.[4] No principle of law seems better settled than that a man cannot reap the fruits of his agent's frauds without also becoming subject to the burdens of such fraud.[5]

While it is sometimes stated that in order to render the principal liable for his agent's misrepresentations, they must be made for the principal's benefit, it is submitted that this is too stringent, that the true rule is that they must be within the scope of the authority, and that the fact that they are for the principal's benefit has merely an evidential force in determining whether they are within the scope of the authority. Representations of agents outside the scope of the authority are of course not binding upon the princi-

Haskell *v.* Starbird, 152 Mass. 117; Busch *v.* Wilcox, 82 Mich. 315, s. c. 336; Griswold *v.* Gebbie, 126 Pa. St. 353; Wolfe *v.* Pugh, 101 Ind. 293; Rhoda *v.* Annis, 75 Me. 17; Smalley *v.* Morris, 157 Pa. St. 349.

[1] Haskell *v.* Starbird, *supra;* Griswold *v.* Gebbie, *supra.*

[2] Wolfe *v.* Pugh, *supra.*

[3] Bennett *v.* Judson, 21 N. Y. 238; Garner *v.* Mangam, 93 N. Y. 642; Krumm *v.* Beach, 96 N. Y. 398; Fairchild *v.* McMahon, 139 N. Y. 290; Wolfe *v.* Pugh, 101 Ind. 293, 304.

[4] Adams *v.* Irving Nat. Bank, 116 N. Y. 606.

[5] Myerhoff *v.* Daniels, 173 Pa. St. 555.

pal.[1] What is now insisted upon is that they are not necessarily outside of the scope of the ostensible authority merely because they are not, in fact, for the principal's benefit.

The difference between this rule and the rule that the fraud must be for the principal's benefit is well illustrated in the case of the issue of fictitious bills of lading or fictitious stock certificates by an agent authorized to issue bills of lading or stock certificates.[2] It is also illustrated by the conflict of opinion in the case where a local agent of a mercantile agency replied falsely to a subscriber concerning the financial standing of a merchant, not to benefit the agency but to benefit the merchant, and give him a financial credit which his circumstances did not warrant.[3] The trial court thought that the fact that the principal was personally innocent, and that the fraud was not for his benefit, was immaterial.[4] But the court on appeal thought otherwise, although its decision rests in part upon the terms of the subscriber's contract.[5] Cases under this head are irreconcilable. It remains to discuss them more in detail.

§ 154. Fraud for benefit of agent.

Where the fraud is committed within the apparent scope of the authority, and under cover of the principal's name and business, but for the benefit of the agent, there is a sharp conflict of authority as to the liability of the principal.

In England it seems to be established that the principal is never liable under such circumstances. In the leading English case the statement was that, "The master is answerable for every such wrong of the servant or agent as is committed in the course of the service, and for the mas-

[1] Browning *v.* Hinkle, 48 Minn. 544; Lamm *v.* Port Deposit Homestead Asso., 49 Md. 233; Bradford *v.* Hanover Ins. Co., 102 Fed. Rep. 48.

[2] *Post*, §§ 155, 156. See also *ante*, § 52 a.

[3] City Nat. Bank *v.* Dun, 51 Fed. Rep. 160; reversed in Dun *v.* City Nat. Bank, 58 Fed. Rep. 174.

[4] 51 Fed. Rep. 160.

[5] 58 Fed. Rep. 174. Following Pollard *v.* Vinton, 105 U. S. 7; Friedlander *v.* R. Co., 130 U. S. 416; see *post*, §§ 155, 156.

ter's benefit."[1] In a later case it was expressly held that the limiting clause, "and for the master's benefit," is an essential element of the liability.[2]

In the United States two opposite views are taken. One class of cases follows the English holding;[3] another class of cases holds that, "where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact[4] necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice."[5] "If his [the agent's] position and the confidence reposed in him were such as to enable him to escape detection for the while, then the consequences of his fraudulent acts should fall upon the bank, whose directors, by their misplaced confidence and gift of powers, made them possible, and not upon others who, themselves acting innocently and in good faith, were warranted in believing the transaction to have been one coming within the cashier's powers."[6]

This conflict of judicial opinion is well illustrated in two classes of cases: (1) where the agent fraudulently issues stock certificates and sells them for his own benefit; (2) where

[1] Barwick *v.* English Joint Stock Bank, *supra*. And see Houldsworth *v.* City of Glasgow Bank, L. R. 5 App. Cas. 317.

[2] British Mutual Banking Co. *v.* Charnwood Forest R. Co., L. R. 18 Q. B. Div. 714.

[3] Friedlander *v.* Texas, &c. Ry., 130 U. S. 416, and cases in succeeding sections.

[4] Ordinarily an agent can commit a fraud for his own benefit only by misrepresenting an extrinsic fact, as that a document is genuine or valid, that a depositor has funds, and the like. In committing a fraud for his principal's benefit, he usually misrepresents an intrinsic fact, as the quality of an article sold.

[5] Bank of Batavia *v.* New York, &c. R., 106 N. Y. 195, 199.

[6] Phillips *v.* Mercantile Nat. Bk., 140 N. Y. 556, 563. And see cases in succeeding sections.

the agent fraudulently issues bills of lading and sells them for his own benefit.

§ 155. **Fraud for benefit of agent. — Issue of stock certificates.** If a stock transfer agent fraudulently issues stock certificates in excess of the amount which the company may lawfully issue and, by collusion with the transferee of the stock, sells them to innocent purchasers for value for his own benefit, is the company liable in an action for damages to the innocent purchasers of the stock?

The English courts have answered this question in the negative. The purchasers called upon the transfer agent to inquire as to the validity of the stock, and were of course informed that the stock was valid. The Master of the Rolls (Lord Esher) said: "The secretary was held out by the defendants as a person to answer such questions as those put to him in the interest of the plaintiffs, and if he had answered them falsely *on behalf of the defendants*, he being then authorized by them to give answers for them, it may well be that they would be liable. But although what the secretary stated related to matters about which he was authorized to give answers, he did not make the statements for the defendant but for himself. . . . I know of no case where the employer has been held liable when his servant has made statements not for his employer, but in his own interest."[1] It has been thought that the United States Supreme Court has held the same doctrine, but the case in question may well be distinguished on the ground that the third party was buying the stock of the agent, and had therefore no right to rely on his representation where his interest was clearly adverse to that of his principal.[2] But it is clear that the tendency of that court is to follow the English doctrine.[3]

[1] British Mutual Banking Co. *v.* Charnwood Forest Ry., L. R. 18 Q. B. Div. 714, 716–717.

[2] Moores *v.* Citizens' Nat. Bk., 111 U. S. 156. *Cf.* Bank of New York, &c. *v.* American Dock & Trust Co., 143 N. Y. 559.

[3] Friedlander *v.* Texas, &c. Ry., 130 U. S. 416.

A considerable number of American courts have answered the question in the affirmative. The leading New York case[1] presents an exhaustive examination of the whole subject, after an argument by an array of eminent counsel rarely united in one proceeding, and in an opinion by Noah Davis, J., of singular ability and lucidity. The result is embodied in the doctrine that where the principal authorizes an act which necessarily involves in the doing of it a representation as to some extrinsic fact, that he assumes the risk that the representation will be true. "He knows that the person he authorizes to act for him, on condition of an extrinsic fact, which in its nature must be peculiarly within the knowledge of that person, cannot execute the power without as *res gestæ* making the representation that the fact exists. With this knowledge he trusts him to do the act, and consequently to make the representation which, if true, is of course binding on the principal. But the doctrine claimed is that he reserves the right to repudiate the act if the representation be false. So he does as between himself and the agent, but not as to an innocent third party who is deceived by it. The latter may answer, you entrusted your agent with means effectually to deceive me by doing an act which in all respects compared with the authority you gave, and which act represented that an extrinsic fact known to your agent or yourself, but unknown to me, existed, and you have thus enabled your agent, by falsehood, to deceive me, and must bear the consequences. The very power you gave, since it could not be executed without a representation, has led me into this position, and therefore you are estopped in justice to deny his authority in this case. By this I do not mean to argue that the principal authorizes the false representation. He only, in fact, authorizes the act which involves a representation, which, from his confidence in his agent, he assumes will be true; but it may be false, and the risk that it may, he takes, because he gives the confidence and credit which enables its falsity to prove

[1] New York & New Haven R. *v.* Schuyler, 34 N. Y. 30, especially pp. 65–75.

injurious to an innocent party."[1] The doctrine thus established has been followed in many succeeding cases in New York and elsewhere.[2] But the doctrine of these cases is subject to the qualification that the purchaser must act in good faith and prudently; it is not good faith or prudence to trust to the representation where the agent is known to be acting for himself in the sale of the stock.[3] And, of course, the agent must be acting within the apparent scope of the powers entrusted to him; an unauthorized seizure of the powers as a means of fraud, where no authority to exercise them exists, will not render the principal liable.[4]

§ 156. Fraud for benefit of agent. — Issue of fictitious bills of lading.

A similar question arises where the agent, being authorized to issue bills of lading, issues fictitious bills of lading in the name of a confederate and sells them through the confederate to innocent purchasers.

In England it is held that the principal is not liable, the argument being that the agent is authorized to do what is usual in his agency and it is not usual to issue fictitious bills of lading.[5] This play upon words, if resorted to in other cases, would excuse the constituent for every tort of his representative. The English holding has been followed in the Federal courts and in some of the State courts in this country.[6]

[1] New York & New Haven R. *v.* Schuyler, 34 N. Y. 30, especially pp. 70–71.

[2] Fifth Ave. Bk. *v.* Forty-second Street, &c. R., 137 N. Y. 231; Tome *v.* Parkersburg Branch R., 39 Md. 36. See also Allen *v.* South Boston R., 150 Mass. 200; Farrington *v.* Same, 150 Mass. 406; American Wire & Nail Co. *v.* Bayless, 91 Ky. 94; Appeal of Kisterbock, 127 Pa. St. 601.

[3] Moores *v.* Citizens' N. B., *supra;* Allen *v.* South Boston R., *supra;* Farrington *v.* Same, *supra*, Bank of New York, &c. *v.* American Dock & Trust Co., *supra*. *Cf.* New York & New Haven R. *v.* Schuyler, *supra*, p. 64.

[4] Manhattan Life Ins. Co. *v.* Forty-second Street, &c. R., 139 N. Y. 146.

[5] Grant *v.* Norway, 10 C. B. 665; Cox *v.* Bruce, L. R. 18 Q. B. Div. 147. *Cf.* Montaignac *v.* Shitta, 15 App. Cas. 357.

[6] Pollard *v.* Vinton, 105 U. S. 7; Friedlander *v.* Texas, &c. Ry. 130

In the United States many courts hold the principal liable. In a leading New York case,[1] the doctrine of the English courts is expressly disapproved and the doctrine of estoppel *in pais* applied. And this has been followed by subsequent cases in the same and other jurisdictions.[2] Even the courts which hold the other doctrine recognize the essential justice of this. "If the question was *res integra* we confess that it seems to us that this argument would be very cogent."[3] The doctrine is subject to the same qualifications as in its application to the issue of stock certificates.[4]

§ 157. Fraud for benefit of agent. — Other illustrations.

The doctrine above explained and illustrated may be invoked under other circumstances too various to be referred to in detail. Thus a bank cashier who employs his powers to draw checks, for the purpose of converting the funds of the bank to his own use, is using a trust and confidence reposed in him by the bank, and the loss must fall on it rather than on innocent parties.[5] So an agent of a telegraph company who employs his power to send telegrams as an operator in the sending of forged telegrams requesting the transmission of money, is abusing a trust and confidence placed in him by the company, and the latter, rather than the innocent receiver of the telegram, should bear the loss.[6]

U. S. 416; National Bank of Commerce *v.* Chicago, &c. R., 44 Minn. 224, and cases there cited. The artificial reasoning of this class of cases is illustrated by a comparison of the case last cited with McCord *v.* Western Union Tel. Co., 39 Minn. 181, where the same court went to an even questionable length in applying the doctrine of estoppel against the principal.

[1] Armour *v.* Michigan Central R., 65 N. Y. 111.

[2] Bank of Batavia *v.* New York, &c. R., 106 N. Y. 195; Brooke *v.* N. Y., &c. R., 108 Pa. St. 529; St. Louis, &c. R. *v.* Larned, 103 Ill. 293; Wichita Bank *v.* Atchison, &c. R., 20 Kans. 519; Sioux City, &c. R. *v.* First Nat. Bk., 10 Neb. 556; Fletcher *v.* G. W. El. Co., 12 So. Dak. 643.

[3] National Bank of Commerce *v.* Chicago, &c. R., 44 Minn. 224, 235.

[4] Bank of New York, &c. *v.* American Dock & Trust Co., 143 N. Y. 559.

[5] Phillips *v.* Mercantile Nat. Bk., 140 N. Y. 556.

[6] McCord *v.* Western Union Tel. Co., 39 Minn. 181; Bank of Palo Alto *v.* Pacific Postal Tel. Cable Co., 103 Fed. Rep. 841.

"Persons receiving despatches in the usual course of business, when there is nothing to excite suspicion, are entitled to rely upon the presumption that the agents entrusted with the performance of the business of the company have faithfully and honestly discharged the duty owed by it to its patrons, and that they would not knowingly send a false or forged message; and it would ordinarily be an unreasonable and impracticable rule to require the receiver of a despatch to investigate the question of the integrity and fidelity of the defendant's agents in the performance of their duties, before acting." [1]

The result of the whole matter is this: one class of cases insists upon the hard and fast rule that the fraud must be for the principal's benefit in order to render him liable, while the other class of cases gives to that fact only an evidential force in determining the decisive question whether the representation was so far within the scope of the agent's ostensible authority as to warrant third persons in relying upon it. By applying to these cases the doctrines of estoppel already set forth and clearly applicable to cases of contract, the latter view appears to be more nearly in accord with the general principles of agency.[2]

3. *Liability for influencing the Conduct of other Persons toward Plaintiff.*

§ 158. Representations about plaintiff.

In addition to making representations to plaintiff which induce him to change his legal relations to his damage, an agent may make representations about plaintiff which influence the conduct of third persons toward him to his damage. It may be questioned whether liability for such representations depends at all upon doctrines applicable to principal and agent. These torts may be said to lie on the border land between the two fields. As they originate in representations they are within the usual class of duties devolved upon agents as distinguished from servants. But as the injured

[1] McCord *v.* W. U. Tel. Co., *supra.* [2] *Ante*, § 52 a.

person is acted upon instead of being induced to act himself, they are more nearly like the torts of a servant than like those of an agent.[1] Moreover it is doubtful whether any doctrine of estoppel can be applied to them since the plaintiff in these cases has not been misled to his damage by any representation of defendant's agent. These cases, therefore, must be mainly solved by the doctrines applicable to the torts of servants.[2] They may, however, be here briefly enumerated.

§ 159. Inducing breach or termination of contract.

It is actionable to induce a breach of contract by any means, or to induce a termination (without breach), or the non-formation, of a contract by unlawful means.[3] Whether it is actionable to induce termination or non-formation of a contract by persuasion alone is in dispute.[4]

If an agent acting within the scope of his authority induces X to break a contract with plaintiff, or by use of unlawful means induces X to terminate, or to refuse to form, a contract with plaintiff, the principal is liable to plaintiff for such tortious act of his agent.[5] He is not liable if the agent was acting outside the scope of his authority or the course of his employment.[6]

§ 160. Defamation.

A principal is liable in an action for defamation where his agent publishes a libel while acting within the scope of his authority, or usual course of the employment.[7] A corpora-

[1] *Ante*, §§ 148, 149.

[2] *Ante*, § 149.

[3] Lumley *v.* Gye, 2 E. & B. 216; Rice *v.* Manley, 66 N. Y. 82; Angle *v.* Chicago, &c. Ry., 151 U. S. 1; Bigelow on Torts (7th ed.), pp. 127–133.

[4] Allen *v.* Flood, 1898, App. Cas. 1; Walker *v.* Cronin, 107 Mass. 555; Bigelow on Torts (7th ed.), pp. 115–123; *post*, § 295, *et seq.*

[5] Blumenthal *v.* Shaw, 77 Fed. Rep. 954.

[6] Graham *v.* St. Charles St. Ry., 47 La. An. 1656.

[7] Dunn *v.* Hall, 1 Carter (Ind.), 344; Fogg *v.* Boston & Lowell R., 148 Mass. 513; Peterson *v.* W. U. Tel. Co., 75 Minn. 368; Long *v.* Tribune Printing Co., 107 Mich. 207; Allen *v.* News Pub. Co., 81 Wis. 120; *post*, § 252.

tion may be held liable for libel ; [1] but it must be shown that the corporate agent had express or implied authority to make the communication in behalf of the corporation.[2]

An employer is criminally liable for a libel published by his agent or servant within the general scope of the authority or the employment,[3] except as otherwise provided by statute.[4]

§ 161. False arrest and malicious prosecution.

Cases of false arrest are more fully treated under the head of master and servant.[5] Briefly it may be said that a principal or master is liable for a false arrest directed by his agent or servant when such arrest is made in the course of the employment and is intended to be in the employer's interests ; [6] but not when such arrest is outside the course of the employment [7] or primarily in the public interest.[8]

While there are discordant decisions,[9] it may be stated as a general rule that for malicious prosecution instituted by an agent or servant the employer is liable provided the instituting of such prosecution was within the course of the employment or the scope of the authority and was intended for the employer's benefit.[10]

It has been held that corporations could not be made liable

[1] Philadelphia, &c. R. *v.* Quigley, 21 How. (U. S.) 202; Hoboken Printing, &c. Co. *v.* Kahn, 59 N. J. L. 218.

[2] Washington Gas Light Co. *v.* Lansden, 172 U. S. 534.

[3] R. *v.* Gutch, Moo. & Mal. 433; R. *v.* Walter, 3 Esp. 21; R. *v.* Cooper, 8 Q. B. 533; People *v.* Clay, 86 Ill. 147 ; *post*, § 268.

[4] 6 & 7 Vict. c. 96; Odgers on Libel & Slander (3d ed.), pp. 432–434; N. Y. Penal Code, § 246.

[5] *Post*, § 252.

[6] Lynch *v.* Met. &c. Ry., 90 N. Y. 77; Palmeri *v.* Manhattan Ry., 133 N. Y. 261; Staples *v.* Schmid, 18 R. I. 224.

[7] Bank *v.* Owston, 4 App. Cas. 270; Poulton *v.* London, &c. Ry., L. R. 2 Q. B. 534.

[8] Mulligan *v.* N. Y. & R. B. Ry., 129 N. Y. 506; Abrahams *v.* Deakin, 1891, 1 Q. B. 516.

[9] Wallace *v.* Finberg, 46 Tex. 35; Carter *v.* Howe Machine Co., 51 Md. 290.

[10] Reed *v.* Home Savings Bank, 130 Mass. 443; Hussey *v.* Norfolk, &c. R., 98 N. C. 34.

in an action for malicious prosecution;[1] but most jurisdictions have departed from the artificial reasoning of these cases and hold a corporation liable for malicious prosecution to the same extent as any principal;[2] also for malicious conspiracy.[3]

[1] Abrath *v.* Northeastern Ry., 11 App. Cas. 247; Owsley *v.* Montgomery, &c. R., 37 Ala. 560.

[2] Goodspeed *v.* East Haddam Bank, 22 Conn. 530; Vance *v.* Erie R., 32 N. J. L. 334; Morton *v.* Met. Ins. Co., 34 Hun, 366; 103 N. Y. 645; Williams *v.* Planters' Ins. Co., 57 Miss. 759.

[3] Buffalo Lubricating Oil Co. *v.* Standard Oil Co., 106 N. Y. 669; 12 N. E. Rep. 825.

CHAPTER XIV.

LIABILITY OF THIRD PERSON TO PRINCIPAL.

§ 162. Introductory.

We have thus far spoken in this part mainly of the liabilities of the principal for the acts of his agent. It now remains to consider briefly the rights which the principal may acquire from the acts of his agent, as against third persons with whom the agent deals. The liability of a third person to the principal may arise: (1) from a contract obligation of which the principal is entitled to avail himself; (2) from a quasi-contractual obligation of which the principal is entitled to avail himself; (3) from a tort obligation of which the principal is entitled to avail himself; (4) from a trust obligation of which the principal is entitled to avail himself in equity. Each of these classes of liabilities will be briefly discussed.

1. *Contract Obligations.*

§ 163. Contracts by agent.

A contract made by an agent in behalf of his principal may be either: (1) made by the agent in the name of the principal within the scope of a prior authority; (2) made by the agent in the name of the principal outside the scope of a prior authority, but subsequently ratified; (3) made by the agent in the name of a foreign principal; (4) made by the agent in his own name. The rights of the principal vary in accordance with these variations in the manner of forming the contract.

§ 164. Contracts in the name of the principal.

(1) *Authorized contracts.* It is too clear to need demonstration that a contract made by an agent within his authority, real or apparent, which would bind the principal will also

bind the third party. This is in accordance with the established doctrines of the mutuality of contractual obligations. In such a case the principal is both the real and nominal party in interest and is the only one who can sue or be sued upon the contract.[1]

(2) *Ratified contracts.* An unauthorized contract made in the name of the principal and subsequently ratified stands upon the same footing as one previously authorized. The ratification exonerates the agent from liability, relates back to the time of the formation of the contract, and creates all the rights and obligations in favor of and against the principal, which would have sprung from an authorized contract. Accordingly after a binding ratification[2] the principal is the only one who can sue or be sued upon such a contract.[3] It has recently been held by the House of Lords in England that an unauthorized contract made in behalf of an undisclosed principal cannot be ratified by him so as to enable him to sue or be sued upon it.[4]

(3) *Contract for foreign principal.* It is a rule of the English law that *prima facie* a principal resident in one country is not a party to a contract made in another country, by his agent resident there, and that he can neither sue nor be sued upon it; but the presumption may be overcome by showing that the agent had authority to pledge his principal's credit and that the third party accepted the credit, thus establishing a privity of contract between the third party and the principal.[5] The rule of the American law is otherwise as will be seen hereafter.[6]

§ 165. Contracts in the name of the agent.

An agent may contract in his own name either: (1) for an undisclosed principal; (2) for a disclosed principal who, how-

[1] Fairlie *v.* Fenton, L. R. 5 Ex. 169; Sharp *v.* Jones, 18 Ind. 314; Dicey on Parties to Actions, Rule 17.

[2] *Ante*, §§ 31–44.

[3] *Ante*, §§ 45–49; Ancona *v.* Marks, 7 H. & N. 686.

[4] Keighley *v.* Durant, 1901, App. Cas. 240.

[5] *Post*, § 187.

[6] *Ibid.*

ever, is not named in the formal contract. Each case presents features involving the rights and liabilities of the principal.

(1) *Undisclosed principals.* The rights and liabilities of an undisclosed principal have already been considered. Subject to the exceptions there enumerated the third person is liable to the undisclosed principal in the same manner as if the latter had been disclosed.[1]

(2) *Unnamed principal.* An agent may disclose his principal and intend to make a contract in his behalf, but fail of this purpose by an omission to name the principal in the formal instrument. In such a case if the instrument be a simple contract the omission may be supplied and the principal may both sue and be sued upon the contract;[2] but if the instrument be under seal or negotiable, parol evidence cannot, at common law, be received even to effectuate the intention of the parties,[3] nor can it be received where by the terms of a simple contract it clearly appears that exclusive rights and credit were given to the agent.[4]

It follows that there are three cases in which the agent also can sue: (1) where the agent contracts by deed in his own name; (2) where the agent contracts in a negotiable instrument in his own name; (3) where by the terms of a contract rights under it are expressly restricted to the agent.[5] Where one contracts really for himself, but ostensibly for another whom he does not name, he may sue as principal.[6] In other cases of simple contracts made for an undisclosed or unnamed principal, the principal may sue, although the agent may also sue in some cases.[7]

2. *Quasi-Contract Obligations.*

§ 166. Money paid by mistake.

It is a general principle of the law that money paid under a mistake of material fact, in the belief that it is due, may be recovered back in an action for money had and received,

[1] *Ante*, §§ 129–135.
[2] *Post*, § 197.
[3] *Post*, §§ 188, 189.
[4] *Ante*, § 132; *post*, § 186.
[5] *Post*, § 207.
[6] Dicey on Parties, Rule 18.
[7] *Post*, § 208.

where it would be against conscience for the payee to retain it.[1] The action is based on equitable principles and proceeds upon the fiction that the defendant promised to pay the money back. In this action it is immaterial whether the principal paid the money in person or through an agent; in either case he is entitled to proceed in quasi-contract for his remedy. Accordingly a principal may maintain an action for money had and received against a third person to whom an agent has paid it under a mistake of fact,[2] or which is paid by him under a mistake originating with his agent,[3] or with a public or quasi-public officer, on the strength of whose certificate he relies.[4] The government may recover in this way money paid by one of its agents under a mistake or misinterpretation of law.[5]

§ 167. Money paid under duress or fraud.

Where a third person obtains from an agent by duress or fraud moneys belonging to the principal, the latter may recover the moneys so paid by his agent in an action for money had and received.[6] Such actions may always be maintained by the real party in interest since they do not rest upon privity of contract, but upon the contract created by the law.[7] If an agent is compelled to pay illegal charges for the protection of his principal's interests, the latter cannot proceed against the agent but must proceed against the one making the unjust exaction.[8] The agent as well as the principal may, however, proceed against the third party for the amount so paid under duress.[9]

[1] Keener on Quasi-Cont., Ch. II.

[2] United States *v.* Bartlett, Daveis (U. S. Dist. C.), 9, s. c. 2 Ware, 17.

[3] Lane *v.* Pere Marquette Boom Co., 62 Mich. 63.

[4] Talbot *v.* National Bank, 129 Mass. 67; Holmes *v.* Lucas Co., 53 Iowa, 211.

[5] McElrath *v.* United States, 102 U. S. 426; Wisconsin Central R. *v.* United States, 164 U. S. 190; United States *v.* Dempsey, 104 Fed. Rep. 197.

[6] Stevenson *v.* Mortimer, Cowp. 805; Demarest *v.* Barbadoes, 40 N J. L. 604.

[7] Stevens *v.* Fitch, 11 Metc. (Mass.) 248.

[8] Holman *v.* Frost, 26 S. C. 290. [9] Stevenson *v.* Mortimer, *supra.*

Where money belonging to the principal has been diverted by the agent into the hands of a third person who takes with notice of the breach of trust, the latter is liable to the principal in equity, and in some States in quasi-contract, as for money had and received.[1]

3. *Tort Obligations.*

§ 168. Property diverted by agent. — General rule.

Where an agent disposes of his principal's property beyond the scope of the authority, the principal may recover it from any one into whose hands it has passed.[2] This doctrine rests upon the maxims that a buyer gets no better title than the seller had to give him, and that an owner cannot be divested of his title without his consent. The third party is therefore bound to show that the agent had the authority to transfer the title, or that the principal's conduct has been such as to work an estoppel. Authority may be shown in the usual ways; namely, by previous grant, by subsequent ratification, by necessity, and by estoppel.

To the general and sweeping rule as above stated, there are two well recognized exceptions at the common law and a third which has been created by statute in some jurisdictions. The rule and the common law exceptions are well explained in the case of *Saltus* v. *Everett*,[3] and may be here briefly summarized.

§ 169. Exceptions. (1) Negotiable instruments.

Where the property entrusted to the agent is currency, or negotiable paper transferable by delivery, then under the rules of the law merchant, a *bona fide* purchaser for value will take a title good against the principal, even though the agent exceeds his powers or diverts the property to his own uses.[4] The

[1] *Post*, §§ 177–179.

[2] Thompson *v.* Barnum, 49 Iowa, 392; Barker *v.* Dinsmore, 72 Pa. St. 427; Jackson *v.* Bank, 92 Tenn. 154; Morris *v.* Preston, 93 Ill. 215.

[3] 20 Wend. (N. Y.) 267.

[4] Goodwin *v.* Robarts, L. R. 1 App. Cas. 476; London Stock Bank *v.* Simmons, 1892, App. Cas. 201; Ayer *v.* Tilden, 15 Gray (Mass.), 178; Bank *v.* Vanderhorst, 32 N. Y. 553.

doctrine is broader than the application to agency, since even a thief can give good title to money, or paper that passes like money. In agency, a principal can follow money or negotiable paper passing by transfer only where it is in the hands of one who took with notice of his rights or who did not give a valuable consideration for it. Purchase without notice and for value cuts off the owner's rights. Where paper is restrictively indorsed, as "for collection," it is notice to all subsequent holders of the principal's title.[1]

But if the money or notes come into the third party's hands *mala fide*, the principal may recover; in the case of money, or notes turned into money, the action may be in quasi-contract as for money had and received.[2] If an agent places his principal's money on a wager and loses it, the principal may sue the winner and recover the money.[3]

§ 170. Exceptions. (2) Indicia of ownership; ostensible ownership.

Where the principal not only entrusts his property to the agent, but also clothes the agent with the documentary evidence of ownership of the property, and third persons have reason to believe from such documentary evidence that the agent is the owner, then a *bona fide* purchaser for value will be protected as against the principal.[4] Thus where the principal allows his property to stand on the books of a wharfinger in the name of his agent, he cannot set up his title as against a purchaser from the agent;[5] nor where he allows a vessel to be enrolled in the name of his agent;[6] nor where he allows his agent in purchasing goods to take a bill of sale in his own

[1] Commercial Bank *v.* Armstrong, 148 U. S. 50; Butchers', &c. Bank *v.* Hubbell, 117 N. Y. 384; Freeman's Bank *v.* National Tube Works, 151 Mass. 413.

[2] Clarke *v.* Shee, Cowp. 197.

[3] Vischer *v.* Yates, 11 Johns. (N Y.) 23; Mason *v.* Waite, 17 Mass. 560; Donahoe *v.* McDonald, 92 Ky. 123.

[4] Nixon *v.* Brown, 57 N. H. 34; McNeil *v.* Tenth N. B., 46 N. Y 325.

[5] Pickering *v.* Busk, 15 East, 38.

[6] Calais Steamboat Co. *v.* Van Pelt, 2 Black (U. S.), 372.

name;[1] nor where, under an ordinance which provides that licenses shall be taken out in the name of the owner, he allows his agent to take out a license for a public vehicle in his own name.[2] In all these and similar cases the true owner is estopped by his representation, or acquiescence in the representation, as to the agent's title, from setting up his own against one who purchases from the agent on the strength of the representation. But the document must be a representation as to title in order to work an estoppel, and the buyer must rely upon it as such.[3]

Some cases of ostensible ownership are often confused with the cases where the principal is estopped to deny the agent's authority to sell as agent, that is, with cases of ostensible agency. But the distinction is clear. In these cases the buyer treats the seller as owner, and the inquiry is whether the conduct of the true owner has been such as to work an estoppel against him to deny such ostensible ownership. In cases of ostensible agency, the buyer treats the seller as agent for the true owner, and the inquiry is whether the conduct of the principal has been such as to create an estoppel to deny the ostensible agency.[4] Some cases decided on the theory of ostensible agency might well have been decided upon the theory of ostensible ownership.[5] Thus if one sends his goods to an auction room, but confers no documentary indicia of title, it might be reasonably inferred that the auctioneer is clothed with authority to sell them as agent.[6] But if one sends his goods to the sales rooms of one who sells on his own account, but not customarily as agent, and no documentary indicia of title are conferred, the sole question would seem to be (in the absence of express authority to sell)[7] whether the proprietor is so far ostensible owner as to

[1] Nixon *v.* Brown, *supra.*

[2] McCauley *v.* Brown, 2 Daly (N. Y. C. P.), 426.

[3] Hentz *v.* Miller, 94 N. Y. 64.

[4] Ewart on Estoppel, pp. 238–250.

[5] Biggs *v.* Evans, 1894, 1 Q. B. 88; *ante*, § 2, 52; Ewart on Estoppel, pp. 484–485.

[6] Lord Ellenborough in Pickering *v.* Busk, 15 East, 38.

[7] Smith *v.* Clews, 105 N. Y. 283.

estop the true owner in case of a sale to an innocent purchaser.[1]

§ 171. Exceptions. (3) Factors Acts.

A factor is one whose business it is to receive consignments of goods and sell them for a commission.[2] But a factor may also be a merchant buying and selling on his own account. Whether selling in his own right or for another, he may sell in his own name, and it follows that an innocent purchaser may take the goods by barter, or for a pre-existing debt of the factor, or in pledge for a contemporaneous debt, in ignorance of the fact that they belong to an undisclosed principal. In any one of these cases the principal may reclaim his goods as against the innocent purchaser, for it is arbitrarily declared to be the rule of law that the authority of the factor is only to sell and not to barter, or pledge.[3]

Owing to the frauds made possible by this rule, and deeming it better that where one of two innocent persons must suffer he should bear the loss who reposed the trust in the wrong-doer, the legislatures in several jurisdictions have passed "Factors Acts" for the relief or protection of innocent third parties. The most sweeping is the English Factors Act of 1889 (52–53 Vict. c. 45) which supersedes earlier enactments beginning with 4 Geo. IV. c. 83 (1823). The New York Factors Act (1830 c. 179) is the beginning of similar legislation in this country.[4]

The New York Act (§ 3) provides that: "Every factor or other agent[5] entrusted with the possession of any bill of lading, custom-house permit, or warehouse-keeper's receipt for the delivery of any such[6] merchandise, and every such

[1] Levi *v.* Booth, 58 Md. 305; Biggs *v.* Evans, 1894, 1 Q. B. 88.

[2] *Ante*, § 111.

[3] Patterson *v.* Tash, 2 Str. 1178; Newbold *v.* Wright, 4 Rawle (Pa.), 195; Gray *v.* Agnew, 95 Ill. 315; Allen *v.* St. Louis Bank, 120 U. S. 20; Warner *v.* Martin, 11 How. (U. S.) 209.

[4] See Stimson's Am. Statute Law, §§ 4380–4388. The English and New York Acts will be found in the Appendix; *post*, pp.

[5] The English Act reads "mercantile agent."

[6] That is, any such as is described in § 1 of the Act, namely, merchandise shipped in the name of the agent, or, under this clause of § 3,

factor or agent not having the documentary evidence of title who shall be entrusted with the possession of any merchandise for the purpose of sale,[1] or as security for any advances to be made or obtained thereon,[1] shall be deemed to be the true owner thereof,[2] so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of the whole or any part of such merchandise, for any money advanced, or negotiable obligation in writing given by such other person upon the faith thereof."

The act (§ 4) further provides that taking such merchandise from such an agent for an antecedent debt gives no right or interest other than was possessed or might have been enforced by the agent himself; and (§ 5) that in any case the true owner may reclaim his property upon repaying the third party any advances made by him or may recover a balance due from a third party upon satisfying any demand justly due such party. This act has been the subject of many judicial decisions, a few of which may be noted.

It is to be observed that the factor or agent must be one entrusted (*a*) with a document of title as enumerated, or (*b*) with possession of the goods for the purpose of sale, or as security for advances to be made or obtained thereon. Calling the agent a "trustee" does not prevent the act from operating if the relation is in fact that of principal and agent.[3] But an

merchandise of which the documentary evidence of title is in the agent's name. First N. B. *v.* Shaw, 61 N. Y. 283, 300.

[1] Under the English Act the factor need not be entrusted with the goods for the purpose of sale, or as security for advances; it is enough that he is in possession with the consent of the owner. The New York Act expressly provides that, "Nothing contained in this act shall authorize a common carrier, warehouse-keeper, or other person to whom merchandise or other property may be committed for transportation or storage only, to sell or hypothecate the same." § 7. This same result is reached in the English Act by limiting the Act to "mercantile agents."

[2] This is ostensible ownership. The English Act reads, "any sale, pledge, or other disposition . . . shall . . . be as valid as if he were expressly authorized by the owner of the goods to make the same." This is ostensible agency in form.

[3] New York Security & Trust Co. *v.* Lipman, 91 Hun, 554, affirmed, 157 N. Y. 551

employee in the owner's store or place of business is not such an agent, because in such case the possession of the agent is the possession of the owner, and not such a "possession for the purpose of sale" as is meant in the act.[1] But the possession of a travelling salesman is possession by the agent within the meaning of the act.[2] Possession of the goods must be for one of the purposes enumerated in order that the act shall apply.[3] Actual and not merely constructive possession is necessary in the absence of documentary evidence of title;[4] and such possession must have been given voluntarily by the principal, for if the agent obtains the goods by trespass or fraud he is not entrusted with them.[5] If the agent be entrusted with a document of title this must be in his name.[6] He must have been entrusted with it by the owner;[7] but entrusting a factor with a primary document out of which the one dealt with grows, is the same as entrusting him with the latter directly.[8] The documents of title to which the act applies are only the three enumerated.[9]

It is to be observed that the third party must have made a contract of sale, pledge, or otherwise, "upon the faith thereof," that is, upon the faith of the appearance of ownership in the agent. To entitle the third party to the protection of the statute, it must appear that he believed the factor to be the true owner.[10] One making advances to a factor upon goods known not to be the goods of the factor cannot claim an estoppel under this act.[11] But a mere delay between

[1] Sage *v.* Shepard & Morse Lumber Co., 4 N. Y. App. Div. 290, affirmed, 158 N. Y. 672.

[2] Cairns *v.* Page, 165 Mass. 552.

[3] Moors *v.* Kidder, 34 Hun, 534, affirmed, 106 N. Y. 32.

[4] Howland *v.* Woodruff, 60 N. Y. 73.

[5] Kinsey *v.* Leggett, 71 N. Y. 387; Soltau *v.* Gerdau, 119 N. Y. 380; Prentice Co. *v.* Page, 164 Mass. 276.

[6] First N. B. *v.* Shaw, 61 N. Y. 283.

[7] Bonito *v.* Mosquera, 2 Bosw. (N. Y.) 401.

[8] Cartwright *v.* Wilmerding, 24 N. Y. 521.

[9] Bonito *v.* Mosquera, 2 Bosw. (N. Y.) 401; Western Transp. Co. *v.* Barber, 56 N. Y. 544.

[10] Stevens *v.* Wilson, 3 Den. 472; approved, 6 N. Y. 380.

[11] Covell *v.* Hill, 6 N. Y. 374.

the time of the advance, and the actual transfer of the pledge, is not fatal, if the advance was made on the faith thereof.[1]

The effect of the Factors Acts is merely to extend the general doctrine of estoppel to the correction of an especially narrow judicial dogma. The courts decided that a factor could not, without express authority, pledge his principal's goods, whatever appearance of authority or of ownership he might be vested with.[2] Some courts have deplored this dogmatic rule, but have felt bound by it.[3] The legislatures have aided the courts by extending the doctrines of estoppel to this set of facts.[4]

§ 172. Forms of action for property or its value.

When the principal's property has been converted by the third party, the principal has his choice of several remedies. If the property is still in the hands of the third party, an action of replevin will lie for its recovery or an action of trover for its value. If it has been sold by the third party, the tort may be waived and an action of assumpsit brought as for money had and received;[5] and in some jurisdictions when the goods have not been sold, but have been kept or consumed, the principal may waive the tort and sue in assumpsit as for goods sold and delivered.[6] If the third party took the property with notice of the principal's rights or without giving a valuable consideration, and has converted it into another form of property, equity will, in many cases, fasten a trust upon the property so obtained, and enforce the trust in favor of the principal.[7] In the case of money, an action for money had

[1] Cartwright *v.* Wilmerding, 24 N. Y. 521.

[2] Patterson *v.* Tash, 2 Str. 1178; Newbold *v.* Wright, 4 Rawle (Pa.), 195; Gray *v.* Agnew, 95 Ill. 315.

[3] Pickering *v.* Busk, 15 East, 38; Martini *v.* Coles, 1 M. & S. 140; Horr *v.* Barker, 11 Cal. 393.

[4] See for an admirable review of this legislation, and its relation to the doctrines of estoppel, Ewart on Estoppel, pp. 353–369.

[5] Keener on Quasi-Cont., p. 170 *et seq.*

[6] *Ibid.*, pp. 192–195.

[7] *Post*, § 177.

and received will lie against successive holders until it comes into the hands of a *bona fide* holder for value.[1]

§ 173. Wrongs of fraud and malice.

The third person may become liable to the principal in tort, aside from cases of conversion of property already noticed, either: (1) for a fraud connected with a contract entered into between the agent and the third person in behalf of the principal; (2) for a fraud committed on the principal by collusion between the agent and the third person; (3) for an unlawful interference with the agent in the discharge of his duties, or with the contract of agency. These classes of torts generally involve either fraud or malice, — fraud in inducing the principal to enter into a contract, or malice in unlawfully interfering with a contract which the principal has already made.

§ 174. Frauds in making contract.

We have already seen that a principal is liable for the frauds of his agent committed while making contracts with third persons. Conversely the third person is liable to the principal for frauds practised on the agent while the latter is acting in behalf of the principal, since every person is liable for his own torts to the person injured thereby. This proposition needs no discussion. It extends to frauds for which an action for deceit will lie, as well as to those for which the remedy is merely rescission of the contract.[2]

§ 175. Collusive fraud between agent and third person.

The third person and the agent may combine to commit a fraud upon the principal. In such a case they are joint tort feasors, and both are liable for the injury. Accordingly the principal may maintain an action against the third person, or the agent, or both jointly.[3] The fact that the agent may be held for his breach of trust does not prevent a recovery

[1] Keener on Quasi-Cont., pp. 183–188.

[2] Cushing *v.* Rice, 46 Me. 303; Perkins *v.* Evans, 61 Iowa, 35; White *v.* Owen, 12 Vt. 361.

[3] Boston *v.* Simmons, 150 Mass. 461; Mayor *v.* Lever, 1891, 1 Q. B. 168.

against the third person, since the agent is guilty of two wrongs: first, for his breach of trust as agent; and second, for the consummated conspiracy with the third person to injure the plaintiff.[1] If a contract has been made where the agent was in collusion with the third person, the principal may repudiate it[2] and recover damages either in tort or assumpsit.[3] So where the third person knows that the agent is committing a fraud on his principal, he becomes a party to the fraud by contracting with such knowledge, and the contract may be avoided by the principal.[4]

§ 176. Interference with agency.

The third person is liable to the principal for unlawfully interfering with the agent or the agency. He is liable if he unlawfully injures the agent, and thereby renders him unfit to perform the duties of the agency;[5] or if he unlawfully interferes with the agent in the performance of the duties of the agency.[6] He is also liable for unlawfully inducing the agent to break his contract of employment with the principal,[7] though some cases hold that he is liable only where he has used unlawful means, as force, threats, or fraud.[8] Whether the act of the third person in inducing the breach can ever be justified, and if so on what grounds, seems not to be decided. The doctrine has become much broader in its application than inducing breach of contracts of employment, and extends to breach of contract generally.[9] Whether there is any remedy

[1] Mayor *v.* Lever, *supra;* Keator *v.* St. John, 42 Fed. Rep. 585.

[2] Smith *v.* Sorby, 3 Q. B. D. 552 n.; Panama, &c. Co. *v.* India Rubber Co., L. R. 10 Ch. App. 515; Miller *v.* R. R. Co., 83 Ala. 274.

[3] City of Findlay *v.* Pertz, 66 Fed. Rep. 427; Glaspie *v.* Keator, 56 Fed. Rep. 203.

[4] Hegenmyer *v.* Marks, 37 Minn. 6.

[5] Ames *v.* Union Ry. Co., 117 Mass. 541; Daniel *v.* Swearengen, 6 S. C. 297; *post*, § 296.

[6] St. Johnsbury, &c. R. Co. *v.* Hunt, 55 Vt. 570.

[7] Lumley *v.* Gye, 2 El. & Bl. 216; Walker *v.* Cronin, 107 Mass. 555; Haskins *v.* Royster, 70 N. C. 601. Bigelow on Torts (7th ed.), §§ 246, 247.

[8] Bourlier *v.* Macauley, 91 Ky. 135.

[9] See Temperton *v.* Russell, 1893, 1 Q. B. 715; Angle *v.* Chicago, &c. Ry., 151 U. S. 1; *post*, § 298.

for inducing by persuasion the termination of a contract terminable at will, is in dispute.[1]

If the principal brings an action for the loss of the services of his agent occasioned by a negligent injury at the hands of a third party, it seems that the contributory negligence of the agent would be a bar to his recovery, though the principal is personally free from blame.[2]

4. *Trust Obligations.*

§ 177. Constructive trusts.

Constructive trusts arise where one person has obtained money or property which does not equitably belong to him and which does equitably belong to another. Although the one so obtaining the property of another has never expressly or impliedly undertaken to hold it as trustee, yet equity fastens upon him the character of a trustee and compels him to account to the beneficial owner as such.[3] The trust so "constructed" by equity is analogous to the contract "constructed" by the common law in cases of quasi-contract.

§ 178. Following trust funds.

If an agent has come into the possession of property or funds which are impressed with a trust in favor of his principal, the principal may follow such property or funds, or the proceeds of such property, so long as they can be identified, or until they reach the hands of a *bona fide* purchaser for value.[4] And if they become so commingled with the property or funds of the agent that identification is impossible, the entire mass will be subject to a charge in favor of the principal to the amount of the trust fund.[5]

[1] *Ante*, § 159; *post*, §§ 298–299.

[2] Chicago, B. & Q. R. *v.* Honey, 63 Fed. Rep. 39.

[3] 2 Pomeroy's Eq. Jurisp. § 1047.

[4] Roca *v.* Byrne, 145 N. Y. 182; Peak *v.* Ellicott, 30 Kans. 156; Van Alen *v.* Am. Nat. Bk., 52 N. Y. 1; Nat. Bk. *v.* Ins. Co., 104 U. S. 54; McLeod *v.* Evans, 66 Wis. 401; Knatchbull *v.* Hallett, L. R. 13 Ch. Div. 696.

[5] Peak *v.* Ellicott, 30 Kans. 156; Frith *v.* Cartland, 34 L. J. Ch. 301; Broadbent *v.* Barlow, 3 DeG. F. & J. 570.

In accordance with this general doctrine, it is held that if a third person obtains from an agent the property of the principal under circumstances which give the third person no equitable claim to it, equity will fasten upon the property a trust for the benefit of the principal, and "will follow the fund through any number of transmutations and preserve it for the owner as long as it can be identified,"[1] or until it passes into the hands of a *bona fide* purchaser for value. It is not necessary that the trustee should be guilty of an intent to defraud the principal; he may intend no moral wrong, yet if he comes into the possession of the property with notice of the principal's rights, or as a volunteer not taking for value, he is declared to hold in trust for the principal.[2] It is only where the superior equity of a *bona fide* purchaser for value intervenes, or where the doctrine of estoppel can be invoked, that the right of the principal to pursue the trust fund is cut off.[3] It is under the application of this doctrine that banks are not allowed a banker's lien or right of set-off against funds deposited by the agent where the bank knows that the funds belong to the principal;[4] that attaching creditors of the agent are not allowed to reach the fund so deposited;[5] and that a donee of the fund, or of property purchased with it, is declared to be a trustee for the benefit of the principal.[6] So also neither the assignee in bankruptcy of an agent, nor the creditors of the agent, can claim, as against the principal, any money or property entrusted by the principal to the agent.[7]

In order that the right to follow the fund should exist it is necessary that it be a fund to which title was in the principal before the diversion. Where an agent fraudulently

[1] Farmers', &c. Bank *v.* King, 57 Pa. St. 202.

[2] 2 Pomeroy's Eq. Jurisp. § 1048.

[3] *Ante*, §§ 169–171.

[4] National Bank *v.* Ins. Co., 104 U. S. 54; Baker *v.* New York N. B., 100 N. Y. 31; Union, &c. Bk. *v.* Gillespie, 137 U. S. 411.

[5] Farmers', &c. Bk. *v.* King, *supra*.

[6] Riehl *v.* Evansville Foundry Ass'n, 104 Ind. 70.

[7] Scott *v.* Surman, Willes, 400; Taylor *v.* Plumer, 3 M. & S. 562; *Ex parte* Cooke, 4 Ch. Div. 123; Harris *v.* Truman, 9 Q. B. D. 264.

took commissions from third persons and then invested the fund so received, it was held that the principal could not follow the fund into the investments, since it was not a fund previously belonging to him, but a debt due him from the agent for which an action for money had and received was an appropriate remedy.[1] It is further necessary that the fiduciary relationship of principal and agent should be established. If the relation is any other, as vendor and vendee, the fund is that of the independent operator and cannot be followed.[2]

§ 179. Legal remedies for diversion of trust fund.

The doctrine of following trust funds is a peculiarly equitable one, and it has been held that the only remedy in such cases is in equity.[3] But owing to the peculiarities of the history of equity jurisdiction in some of the States, legal remedies based on equitable principles are available.[4] In such jurisdictions actions for money had and received may be maintained by the principal against third parties into whose hands the fund has passed. And if the principal's *money* has been *converted* to the use of the third party, it may be followed until it reaches the hands of a *bona fide* holder for value, and recovered in an action as for money had and received.[5]

[1] Lister *v.* Stubbs, L. R. 45 Ch. Div. 1.

[2] *Ex parte* White, L. R. 6 Ch. App. 397; *ante*, § 3.

[3] National Bank *v.* Ins. Co., 104 U. S. 54.

[4] Frazier *v.* Erie Bank, 8 Watts & Serg. (Pa.) 18; Sheffer *v.* Montgomery, 65 Pa. St. 329; Frue *v.* Loring, 120 Mass. 507.

[5] Keener on Quasi-Cont., pp. 183–188.

PART IV.

LEGAL EFFECT OF THE RELATION AS BETWEEN THE AGENT AND THIRD PARTIES.

§ 180. Introduction.

We must once more, and for the last time, shift our point of view. We have now to consider the mutual rights and obligations that may spring up between the agent and the third party in consequence of the manner in which the agent conducts himself toward the third party or the third party toward the agent. Obviously it is not the purpose of the agent or the third party to create obligations as between themselves, and yet through carelessness, ignorance, mistake, or fraud this may result. We will consider the subject under two heads: (1) mutual rights and obligations arising from contract; (2) mutual rights and obligations arising from tort.

CHAPTER XV.

CONTRACT RELATIONS BETWEEN AGENT AND THIRD PARTY.

§ 181. Questions to be considered.

Where an agent enters into a contract on behalf of his principal, he may bind the principal, or himself, or both, or neither; but different rules govern the liability of public agents. Where an agent has money equitably belonging to a third person but which he assumes to hold for his principal, he may be liable to the third person in quasi-contract. On the other hand, an agent who is under obligations to the third party may have rights commensurate with his obligations. This chapter deals therefore with the following topics: —

1. Where the principal alone is bound by the contract.
2. Where the agent alone is bound by the contract.
3. Where both principal and agent are bound by the contract.
4. Where neither principal nor agent is bound by the contract.
5. Special rules applicable to public agents as to liability upon contract.
6. Liability of agent in quasi-contract.
7. Liability of the third person to the agent upon the contract.

1. *Where the Principal alone is bound.*

§ 182. Authorized contract.

Where the agent acts within the apparent scope of his authority for a disclosed principal, and contracts in the name of that principal, the latter alone is bound by the

contract.[1] So where a principal, with full knowledge of the facts, ratifies an unauthorized contract made in his name and on his behalf, the principal alone is bound by the contract.[2]

Whether a written contract is made in the name of the principal, or in the name of the agent, is a matter of construction.[3]

Whether a verbal contract was made in the name of the principal, and on his behalf, is a question of fact for the jury.[4]

2. *Where the Agent alone is bound.*

§ 183. (I) Unauthorized contract.

Where the agent knowingly, negligently, or mistakenly holds himself out, either expressly or impliedly, as having authority to act for a principal in a particular transaction, when in fact he has no such authority, he is liable to the third party who deals with him on the strength of such representation for any damage the latter may suffer in consequence of any change of his legal relations induced by the representation.[5] The question remains, in what kind of an action may the third party pursue his remedy?

(1) *Agent not liable upon the contract.* It is now generally agreed that the agent does not bind himself upon the contract. He does not bind his principal because he has no authority to do so; he does not bind himself because he is not a party to the contract, and the courts will not create a new contract either against or in favor of the

[1] Owen *v.* Gooch, 2 Esp. 567; *Ex parte* Hartop, 12 Ves. 349; Robins *v.* Bridge, 3 M. & W. 114; Whitney *v.* Wyman, 101 U. S. 392; Bonynge *v.* Field, 81 N. Y. 159; Covell *v.* Hart, 14 Hun (N. Y.), 252.

[2] Spittle *v.* Lavender, 2 Brod. & Bing. 452; Grant *v.* Beard, 50 N. H. 129; Brown *v.* Bradlee, 156 Mass. 28; *ante*, §§ 46–49, 101.

[3] Downman *v.* Williams, 7 Q. B. 103; Southwell *v.* Bowditch, 1 C. P, D. 374; Gadd *v.* Houghton, 1 Ex. Div. 357; *post*, §§ 186, 188, 189–195. 197.

[4] Jones *v.* Littledale, 6 A. & E. 486; Holding *v.* Elliott, 5 H. & N. 117; Williamson *v.* Barton, 7 H. & N. 899; Long *v.* Millar, 4 C. P. Div. 450.

[5] Collen *v.* Wright, 7 El. & Bl. 301; Kroeger *v.* Pitcairn, 101 Pa. St. 311.

agent.[1] Some early New York cases[2] which held that an action would lie upon the contract, must be regarded as overruled,[3] and other cases holding a similar doctrine[4] as opposed to the weight of authority.

(2) *Agent liable as for breach of warranty of authority.* Where the agent innocently exceeds his authority under circumstances not amounting to deceit, no action in tort can be maintained.[5] Yet clearly the third party has suffered as great an injury as if the representation had been made fraudulently. In order to provide a remedy in such an emergency, the courts have invented the fiction that the agent "warrants" his authority whenever he makes a contract for his principal, and allow an action for damages for the breach of this warranty of authority.[6] The fiction is well enough, but it should not be allowed to disguise the fact that this is a plain exception to the rule that no action lies for an innocent misrepresentation.[7] It serves the additional purpose of giving an action against the estate of the agent after his death, whereas a tort action would not survive.[8] This rule is subject to the qualification that if the agent acts in good faith, and the third party has full knowledge of all the facts upon which the agent's belief is founded, there is

[1] Ballou *v.* Talbot, 16 Mass. 461; McCurdy *v.* Rogers, 21 Wis. 199; Duncan *v.* Niles, 32 Ill. 532; Hall *v.* Crandall, 29 Cal. 568; Cole *v.* O'Brien, 34 Neb. 68; Noyes *v.* Loring, 55 Me. 408; Jenkins *v.* Hutchinson, 13 Q. B. 744; Lewis *v.* Nicholson, 18 Q. B. 503; Pollock on Cont. (6th ed.) 101–103.

[2] Dusenbury *v.* Ellis, 3 Johns. Cas. 70; White *v.* Skinner, 13 Johns. 307.

[3] White *v.* Madison, 26 N. Y. 117; Dung *v.* Parker, 52 N. Y. 494; Baltzen *v.* Nicolay, 53 N. Y. 467; Simmonds *v.* Moses, 100 N. Y. 140.

[4] Dale *v.* Donaldson, 48 Ark. 188; Weare *v.* Gove, 44 N. H. 196.

[5] *Ante*, § 152.

[6] Collen *v.* Wright, 8 El. & Bl. 647; Suart *v.* Haigh, 9 T. L. R. 488; Baltzen *v.* Nicolay, 53 N. Y. 467; Kroeger *v.* Pitcairn, 101 Pa. St. 311; Weare *v.* Gove, 44 N. H. 196; Trust Co. *v.* Floyd, 47 Oh. St. 525; Seeberger *v.* McCormick, 178 Ill. 404, 415–419.

[7] Firbank's Ex'rs *v.* Humphreys, 18 Q. B. D. 54.

[8] Pollock on Torts (5th ed.), pp. 60, note *k*, 508.

no implied warranty,[1] and to the further qualification that if the agent expressly or impliedly states he does not warrant his authority, the implication of a warranty is rebutted.[2] It is necessary, further, in order that the action may be maintained, that the contract made by the agent should be one which would be valid and enforceable against the principal if the agent had been duly authorized.[3]

(3) *Agent liable in tort for wilful deceit.* If the agent wilfully misrepresents his authority, by express declaration or by contract, he is liable to the injured party in an action of deceit.[4] The action *ex delicto* rests upon the wilful or reckless conduct of the agent. If, as suggested above, the fiction of implied warranty were rejected, and the action based upon the representation, whether innocent or guilty, an innocent misrepresentation by an agent would escape the general rule that deceit requires wilful or reckless representations. It is necessary that the other elements of deceit be present. The third party must actually be deceived. If he knows all the facts, the agent is not liable.[5]

(4) *Measure of damage for breach of warranty of authority.* The measure of damages for breach of a warranty of authority by an agent is all the loss resulting from such breach as a natural and probable consequence thereof.[6] Usually this damage is the same that might have been recovered against the principal in case the contract had been authorized and he had refused to perform it.[7] If the third person has brought an action against the principal and been de-

[1] Smout *v.* Ilbery, 10 M. & W. 1.

[2] Lilly *v.* Smales, 1892, 1 Q. B. 456; *post*, § 201.

[3] Baltzen *v.* Nicolay, 53 N. Y. 467; Warr *v.* Jones, 24 W. R. 695; Pow *v.* Davis, 1 B. & S. 220.

[4] Polhill *v.* Walter, 3 B. & Ad. 114; Randell *v.* Trimen, 18 C. B. 786; Noyes *v.* Loring, 55 Me. 408.

[5] Michael *v.* Jones, 84 Mo. 578; Hall *v.* Lauderdale, 46 N. Y. 70.

[6] Firbank's Ex'rs *v.* Humphreys, 18 Q. B. D. 54; Meek *v.* Wendt, 21 Q. B. D. 126; *Re* National Coffee Palace Co., 24 Ch. Div. 367; Bush *v.* Cole, 28 N. Y. 261; Simmonds *v.* Moses, 100 N. Y. 140; Taylor *v.* Nostrand, 134 N. Y. 108.

[7] *Ibid.*, Trust Co. *v.* Floyd, 47 Oh. St. 525; Seeberger *v.* McCormick, 178 Ill. 404, 419.

feated because of the want of authority of the agent, he may, in a subsequent action against the agent for breach of the warranty of authority, recover in addition to the usual damages the costs of the action against the principal.[1] If the contract is unenforceable against the principal because of some defect or informality, other than the want of authority of the agent, no damages can be recovered against the agent based upon the breach of his warranty of authority.[2] Nor can the equitable doctrine of part performance be invoked so as to give a remedy in equity for damages for breach of warranty of authority.[3] In order to maintain the action for damages, the third person must show that the principal has repudiated the contract and that damage has resulted to plaintiff therefrom.[4]

§ 184. (II) Incompetent principal.

An agent is presumed to represent not only that he has authority but that his principal was competent to give such authority when it was given, and has not since, to the knowledge of the agent, become incompetent.[5] A breach of this representation resulting in damage gives the same remedies as a breach of the representation as to authority. But the damage must have been suffered. If the principal be one, as an infant,[6] who may ratify or disaffirm at his election, it must be shown that he has disaffirmed before an action will lie against the agent.[7]

§ 185. (III) Fictitious principal.

Where an agent contracts for an alleged principal who is not in fact in existence at the time, he becomes personally

[1] Randell *v.* Trimen, 18 C. B. 786; Hughes *v.* Graeme, 33 L. J. Q. B. 333; Godwin *v.* Francis, L. R. 5 C. P. 295.

[2] Pow *v.* Davis, 1 B. & S. 220; Baltzen *v.* Nicolay, 53 N. Y. 467.

[3] Warr *v.* Jones, 24 Weekly Rep. 695.

[4] Patterson *v.* Lippincott, 47 N. Y. L. 457.

[5] Drew *v.* Nunn, L. R. 4 Q. B. D. 661; Hoppe *v.* Saylor, 53 Mo. App. 4.

[6] In those jurisdictions where an infant's appointment of an agent is not void, but voidable. — *Ante*, § 15.

[7] Patterson *v.* Lippincott, 47 N. J. L. 457.

liable on the contract as principal,[1] except that he is not liable where his principal dies without his knowledge.[2]

The commonest case of a fictitious principal is the case of a projected corporation whose promoters enter into contracts in anticipation of its formation, and sign "as agents" for the (named) corporation. Obviously there is no principal, as no corporation exists. If it should never exist there could be no question as to the sole liability of the promoters. But how if it is in fact incorporated and "ratifies" the contract of the promoters? There can be no real ratification in such a case because it is the first essential of ratification that the principal should be an existing person at the time the contract was made.[3] Accordingly the agent remains liable unless, by agreement among the three parties, the corporation after it is in existence should be substituted in place of the promoters.[4] This, however, amounts to the discharge of the original contract and the formation of a new one.

Another common case is where A contracts with X in behalf of an unincorporated club or association. Here there is a body of more or less clearly identified persons who might jointly or severally be responsible principals, as individuals, but no legal entity composed of the members in the aggregate. There is not even a partnership.[5] In such case if the agent contracts in the name of a principal, which name conveys the idea of a corporate entity, the agent is clearly liable.[6] Whether the members of the club are also liable depends upon whether in fact they authorized A to make the contract. Such authority may be found in the constitution or by-laws of

[1] Kelner *v.* Baxter, L. R. 2 C. P. 174; Hollman *v.* Pullin, 1 C. & E. 254; Patrick *v.* Bowman, 149 U. S. 411; Lewis *v.* Tilton, 64 Iowa, 220; *cf.* Bartlett *v.* Tucker, 104 Mass. 336.

[2] Smout *v.* Ilbery, 10 M. & W. 1; Carriger *v.* Whittington, 26 Mo. 311.

[3] *Ante*, § 32. But see Whitney *v.* Wyman, 101 U. S. 392; Oakes *v.* Cattaraugus Water Co., 143 N. Y. 430.

[4] *Ibid.*

[5] Flemyng *v.* Hector, 2 M. & W. 172; Ash *v.* Guie, 97 Pa. St. 493.

[6] Lewis *v.* Tilton, 64 Iowa, 220; Blakely *v.* Bennecke, 59 Mo. 193; Comfort *v.* Graham, 87 Iowa, 295.

the club to which the members have assented,[1] or in the vote of a meeting at which the members were present and in the results of which they acquiesced.[2] If the credit was extended to the agent and not to the body he represents, the agent is liable.[3] But if the credit is extended to the club, or its members, and not to the agent, and the agent was authorized to procure such credit, then the club or its members, and not the agent, will be liable.[4]

§ 186. (IV) Exclusive credit to agent.

"The seller who knows who the principal is, and, instead of debiting the principal, debits the agent, is considered, according to the authorities which have been referred to,[5] as consenting to look to the agent only, and is thereby precluded from looking to the principal." [6] An agent may deal so as to bind himself personally, although disclosing his principal; it is always a question of the intention and understanding of the parties.[7] Where in a sale the principal is known, but the personal obligation of the agent alone is taken for the purchase price, it is presumed that credit is given to the agent and not to the principal.[8] In cases where a principal is undisclosed, the third party has an election between the principal and the agent.[9] In cases where the principal is disclosed, the matter becomes one of the intention of the parties at the time of the making of the contract. It has been held that accepting a written contract in the name of the agent, when the principal is known, is conclusive

[1] Flemyng *v.* Hector, *supra;* Todd *v.* Emly, 7 M. & W. 427.

[2] Willcox *v.* Arnold, 162 Mass. 577; Heath *v.* Goslin, 80 Mo. 310.

[3] Eichbaum *v.* Irons, 6 Watts & Serg. (Pa.) 67; *ante*, § 20.

[4] Pain *v.* Sample, 158 Pa. St. 428; Bennett *v.* Lathrop, 71 Conn. 613.

[5] Paterson *v.* Gandasequi, 15 East, 62; Addison *v.* Gandasequi, 4 Taunt. 574; Maanss *v.* Henderson, 1 East, 335.

[6] Thomson *v.* Davenport, 9 B. & C. 78, 89.

[7] Worthington *v.* Cowles, 112 Mass. 30; Kelly *v.* Thuey, 102 Mo. 522; Williamson *v.* Barton, 7 H. & N. 899.

[8] Merrill *v.* Witherby, 120 Ala. 418; Paige *v.* Stone, 10 Metc. (Mass.) 160. But see Atlas S. S. Co. *v.* Colombian Land Co., 102 Fed. Rep. 358.

[9] *Ante*, § 126; *post*, §§ 196, 197.

evidence of an intent to look to the agent alone ;[1] but this is doubtful.[2]

If the ostensible agent is really the principal, and is in fact acting upon his own behalf, he is, of course, liable upon the contract.[3]

§ 187. (V) Foreign principal.

Where the agent contracts in behalf of a foreign principal, that is, one residing out of the jurisdiction, it is the rule of the English law that the agent is presumed to pledge his own credit, and that the third party does not rely upon the credit of the principal, but exclusively upon the credit of the agent, although the contract discloses the principal and the fact of the agency.[4] But there is nothing to prevent one foreign merchant from contracting with another through the instrumentality of an agent, and if he does so, he is, of course, bound by his contract.[5] And the agent may contract exclusively for the foreign principal without recourse to himself.[6]

In the United States, this rule as to foreign principals has been generally disapproved. It is held that there is no presumption that one dealing with an agent of a foreign principal gives exclusive credit to the agent ; that it is in each case a question of fact ; and that the fact that the principal resides in a foreign jurisdiction has merely an evidential force.[7] In reaching this conclusion the courts have probably been in-

[1] Chandler *v.* Coe, 54 N. H. 561.

[2] *Ante*, § 126 ; *post*, § 197.

[3] Carr *v.* Jackson, 21 L. J. Ex. 137 ; Isham *v.* Burgett, 157 Mass. 546 ; *cf.* Heffron *v.* Pollard, 73 Tex. 96.

[4] Leake on Cont. (3d ed.) p. 417 ; Pollock on Cont. (6th ed.) p. 95 ; Hutton *v.* Bulloch, L. R. 9 Q. B. 572 ; Die Elbinger Actien-Gesellschaft *v.* Claye, L. R. 8 Q. B. 313 ; Reynolds *v.* Peapes, 6 T. L. R. 49. But in a recent English work on Agency it is said that, "it now seems that there is no presumption either way, and that it is always a question as to what was the intention of the parties." — Wright on Agency, pp. 296, 297.

[5] Flinn & Co. *v.* Hoyle, 63 L. J. Q. B. 1 (1894).

[6] Green *v.* Kopke, 18 C. B. 549.

[7] Kirkpatrick *v.* Stainer, 22 Wend. (N. Y.) 244 ; Oelricks *v.* Ford, 23 How. (U. S.) 49, 64, 65 ; Bray *v.* Kettell, 1 Allen (Mass.), 80 ; Barry *v.* Page, 10 Gray (Mass.), 398 ; Kaulback *v.* Churchill, 59 N. H. 296.

fluenced by the consideration that the States of the Union are, as to the law merchant, foreign to each other, and that the English rule would work serious inconvenience to trade among the States.[1] Even if the rule were admitted as to principals resident in foreign countries generally, it would probably be denied as to those resident in two different States of the Union.[2]

§ 188. (VI) Contract under seal.

Where an agent makes a contract under seal in his own name (the seal not being merely superfluous), the agent alone is liable on the contract whether his principal be known or unknown. It is a technical rule of the common law that only those parties can be charged upon a sealed instrument in whose names it is made, signed, and sealed.[3] Nor is there any remedy against the principal even in equity.[4] But if the seal is superfluous it may be disregarded.[5] If the instrument be unsealed the principal may be held, even though it be on a contract required by the Statute of Frauds to be in writing.[6]

The recitals, covenants, testimonium clause, signature, and seal must be examined in order to determine whether the instrument is the deed of the principal or of the agent. The instrument, in order to bind the principal, should be in his name, under his seal, and should purport to be his deed; the form of the signature may be "P by A" or "A for P" or "for P, A."[7] If the agent use apt words to charge him-

[1] See Wharton on Agency, §§ 791–793.

[2] Vawter *v.* Baker, 23 Ind. 63; Barry *v.* Page, *supra;* Barham *v.* Bell, 112 N. C. 131.

[3] Cass *v.* Rudele, 2 Vern. 280; Appleton *v.* Binks, 5 East, 148; Hancock *v.* Hodgson, 4 Bing. 269; Briggs *v.* Partridge, 64 N. Y. 357; Kiersted *v.* R. R. Co., 69 N. Y. 343; Sanders *v.* Partridge, 108 Mass. 556.

[4] Borcherling *v.* Katz, 37 N. J. Eq. 150.

[5] Lancaster *v.* Knickerbocker Ice Co., 153 Pa. St. 427; Stowell *v.* Eldred, 39 Wis. 614.

[6] Beckham *v.* Drake, 9 M. & W. 79, 91; Briggs *v.* Partridge, *supra*, Byington *v.* Simpson, 134 Mass. 169.

[7] Wilks *v.* Back, 2 East, 142; Mussey *v.* Scott, 7 Cush. (Mass.) 215;

self personally, he will be bound and not his principal.[1] Thus a deed reciting that it is executed in accordance with the vote of a corporation, but concluding, "I hereunto set my hand and seal," followed by the agent's name and a seal, is the deed of the agent and not of the principal.[2] But where a deed recites that it is made by the "P Co. by A, agent," and concludes, "the parties have hereunto set their hands and seals," and is signed "A, agent [seal]," the P Co. is bound by the instrument, since it is held that the name of the principal need not necessarily appear in the signature, provided it appear in the recitals, and the testimonium clause describes the signature and seal as those of the principal.[3] On the other hand the name of the agent need not appear in the signature.[4]

In the case of public agents, the rule is that the agent is not bound by a sealed instrument, unless the intent to make himself personally liable is clearly disclosed, since it cannot lightly be presumed that individuals have assumed public burdens.[5]

§ 189. (VII) Negotiable instruments. — General rules.

Only the parties who are named or described in a negotiable instrument can sue or be sued upon it. For our present purpose we may state the rule to be that only the person in whose

Varnum *v.* Evans, 2 McMull, (S. C.), 409; Whitehead *v.* Reddick, 12 Ired. (N. C.) 95. But if there be no recitals showing the principal, it has been held that a bond signed "A for P," is the bond of A. Bryson *v.* Lucas, 84 N. C. 680.

[1] Taft *v.* Brewster, 9 Johns. (N. Y.) 334; Dayton *v.* Warne, 43 N. J. L. 659.

[2] Stinchfield *v.* Little, 1 Me. 231.

[3] Bradstreet *v.* Baker, 14 R. I. 546. See also McDaniel *v.* Flower Brook Mfg., Co., 22 Vt. 274; Martin *v.* Almond, 25 Mo. 313; City of Kansas *v.* Hannibal, &c. R., 77 Mo. 180; Whitford *v.* Laidler, 94 N. Y. 145.

[4] Devinney *v.* Reynolds, 1 W. & S. (Pa.) 328; Forsyth *v.* Day, 41 Me. 382; Berkey *v.* Judd, 22 Minn. 287. *Contra*, Wood *v.* Goodridge, 6 Cush. (Mass.) 117.

[5] Hodgson *v.* Dexter, 1 Cranch (U. S.), 345; Knight *v.* Clark, 48 N J. L. 22; *post*, § 203.

name a negotiable instrument is executed is liable upon it and that parol evidence is inadmissible to prove that one who executes a negotiable instrument in his own name did so in behalf of an undisclosed principal, or of a principal disclosed but unnamed in the instrument.[1]

We have already seen that in the case of simple contracts generally, parol evidence is admissible to show that an instrument signed by A. B. was in fact signed by him in behalf of P. Q., and that thereupon P. Q. may be held, though A. B. will not be discharged.[2] But in the case of sealed instruments and negotiable instruments the rule is otherwise; — the first because of the technical rules of the common law governing sealed instruments; the second because of the technical rules of the law merchant governing negotiable instruments. As to either no parol evidence is admissible to change the legal effect of what appears upon the face of the instrument.[3]

To this general rule there are two possible exceptions, so far as concerns negotiable instruments: *first*, it is sometimes held that where there is any indication by words of description or otherwise, that the person signing the paper signed as agent for another, parol evidence may be admitted in an action between the original parties, or those who took the paper with full knowledge of the circumstances attending its execution, in order to show the actual understanding and intent of such original parties; *second*, it is held that where there is a serious ambiguity on the face of the paper, parol evidence may be introduced as between any party and a *bona fide* holder for value in order to explain or remove such ambiguity.

The first exception is not universally admitted. Some jurisdictions adhere to the strict technical rule that parol evidence

[1] Leadbitter *v.* Farrow, 5 M. & S. 345; Price *v.* Taylor, 5 H. & N. 540; Dutton *v.* Marsh, L. R. 6 Q. B. 361; Cragin *v.* Lovell, 109 U. S. 194; Barlow *v.* Congregational Society, 8 Allen (Mass.), 460; Sturdivant *v.* Hull, 59 Me. 172; Rendell *v.* Harriman, 75 Me. 497; Casco N. B. *v.* Clark, 139 N. Y. 307. See *ante*, § 120.

[2] *Ante*, § 123. See Leake on Cont. (6th ed.) pp. 441–442.

[3] Briggs *v.* Partridge, 64 N. Y. 357.

is inadmissible to introduce into a negotiable instrument any person who is not by the terms thereof a party to the instrument, and that the ambiguity or doubt raised by signing "A, agent," or "A, agent of P," or "A, treas.," [1] or "A, treas. of P. Co.," is not sufficient to let in parol evidence even as between the original parties to the paper or those who stand in their shoes.[1] On the other hand, there is a strong authority for the exception to be found in the holdings of other jurisdictions.[2]

The second exception is also involved in considerable conflict and confusion. The face of the negotiable instrument may disclose an ambiguity or doubt as to who is the real maker, and in such a case it is said that parol evidence is admissible to remove the ambiguity. At one extreme are cases where clearly the instrument is upon its face the obligation of the principal. At the other extreme are cases where clearly the obligation is that of the agent. Between these extremes, and shading into them by imperceptible degrees, are cases of ambiguity or doubt. Some of these ambiguous cases are resolved by the court as cases for interpretation upon an examination of the instrument. Some are resolved by the aid of parol evidence introduced to remove that ambiguity. Almost hopeless confusion arises from the fact that practically the same instrument will be resolved by one court by interpretation as the obligation of the principal, by another as the obligation of the agent, and by a third in accordance with the fact as established by parol evidence.[3]

[1] Tucker Mfg. Co. *v.* Fairbanks, 98 Mass. 101; Williams *v.* Second N. B., 83 Ind. 237; Collins *v.* Buckeye State Ins. Co., 17 Oh. St. 215.

[2] Metcalf *v.* Williams, 104 U. S. 93; Case Mfg. Co. *v.* Soxman, 138 U. S. 431; Brockway *v.* Allen, 17 Wend. (N. Y.) 40; Kean *v.* Davis, 21 N. J. L. 683; Keidan *v.* Winegar, 95 Mich. 433; Kline *v.* Bank, 50 Kans. 91; Janes *v.* Citizens' Bank, 9 Okla. 546, and cases there discussed, overruling Keokuk Falls Imp. Co. *v.* Kingsland, &c. Co., 5 Okla. 32.

[3] Compare, for example, Carpenter *v.* Farnsworth, 106 Mass. 561; Casco National Bank *v.* Clark, 139 N. Y. 307; and Frankland *v.* Johnson, 147 Ill. 520. And compare Liebscher *v.* Kraus, 74 Wis. 387; Matthews *v.* Dubuque Mattress Co., 87 Iowa, 246; and Reeve *v.* First National Bank, 54 N. J. L. 208.

Under such circumstances it is impossible to formulate settled rules as to the interpretation of these intermediate cases. Perhaps the most useful course will be to take up the general classes of cases and ascertain the trend of judicial opinion. The cases for construction fall first into three classes: (1) where the construction rests upon the signature alone; (2) where the construction rests upon the signature aided by recitals in the body of the instrument; (3) where the construction rests upon the signature aided by marginal recitals, memoranda, or headings. These will be considered in the order named.

The parties upon a negotiable instrument may be the maker of a promissory note or the drawer of a bill of exchange, or the acceptor of a bill of exchange, or the indorser of a bill or note. And first of the maker or drawer.

§ 190. Same. — (1) Construction from signature alone.

1. The signature written by the agent as maker or drawer may be unequivocally that of the principal, and the sole inquiry will be as to the authority of the agent to sign. The following are such signatures. (1) P. Q.; (2) P. Q., by his agent A. B., or by A. B., agent, — or by A. B.; (3) A. B., agent for P. Q.; or A. B. for P. Q.; (4) *Pro.* P. Q. — A. B.[1]

2. The signature written by the agent as maker or drawer may be unequivocally the signature of the agent alone, and the agent alone will be bound. The following are such signatures: (1) A. B.; (2) A. B., agent; (3) A. B., agent of P. Q.;[2] (4) A. B., president, or treasurer, etc.;[3] (5) A.

[1] 1 Daniel on Neg. Inst. § 298; Long *v.* Colburn, 11 Mass. 97; Ballou *v.* Talbot, 16 Mass. 461; *cf.* Tannatt *v.* Rocky Mt. Nat. Bk., 1 Colo. 278; De Witt *v.* Walton, 9 N. Y. 571.

[2] Sparks *v.* Dispatch Trans. Co., 104 Mo. 531; Pentz *v.* Stanton, 10 Wend. (N. Y.) 271; Williams *v.* Robbins, 16 Gray (Mass.), 77; Bank *v.* Cook, 38 Oh. St. 442; Tarver *v.* Garlington, 27 S. C. 107; Cragin *v.* Lovell, 109 U. S. 194.

[3] Davis *v.* England, 141 Mass. 587; Hobson *v.* Hassett, 76 Cal. 203; *cf.* Metcalf *v.* Williams, 104 U. S. 93, which was a case between original parties, and Devendorf *v.* West Virginia, &c. Co., 17 W. Va. 135, which

B., president, or treasurer, etc., of the P. Q. Co.;[1] (6) A. B., trustee.[2]

It has been thought that the signature "A. B., cashier," stands upon a different footing, but this is questionable.[3] It has also been held that there is a distinction between suits brought by a party to the instrument, or one who stands in his shoes, and suits by a *bona fide* holder for value.[4]

3. The signature written by the agent as maker or drawer may be the signature of his principal followed by his own signature with the descriptive words, "agent," "president," "treasurer," etc., added, as, for example, "The P. Q. Co., A. B., President." In such a case there are three holdings on practically the same state of facts: (*a*) that it is the signature of the principal alone;[5] (*b*) that it is the signature of both the principal and agent;[6] (*c*) that it is an ambiguous signature and parol evidence is admissible to explain it.[7]

Two other auxiliary holdings may be noted. First, the seal of the corporation is to be given the same effect as the written name of the corporation.[8] Second, in a jurisdiction where parol evidence would not be admitted to discharge the agent, the instrument may be reformed in equity to work his discharge, in case of proof of mutual mistake as to the form of signature necessary.[9]

4. The principal may adopt the name of the agent as his

seems to proceed upon the theory that the principal had "adopted" the agent's name.

[1] Sturdivant *v.* Hull, 59 Me. 172; Rendell *v.* Harriman, 75 Me. 497; Tucker Mfg. Co. *v.* Fairbanks, 98 Mass. 101; Burlingame *v.* Brewster, 79 Ill. 515; Bank *v.* Cook, 38 Oh. St. 442.

[2] Price *v.* Taylor, 5 H. & N. 540.

[3] See *post*, § 194.

[4] *Ante*, § 189.

[5] Liebscher *v.* Kraus, 74 Wis. 387; Reeve *v.* First Nat. Bk., 54 N. J. L. 208; Grafton N. B. *v.* Wing, 172 Mass. 513.

[6] Matthews *v.* Dubuque Mattress Co., 87 Iowa, 246.

[7] Bean *v.* Pioneer Mining Co., 66 Cal. 451; Case Mfg. Co. *v.* Soxman, 138 U. S. 431.

[8] Means *v.* Swormstedt, 32 Ind. 87; Scanlan *v.* Keith, 102 Ill. 634; Miller *v.* Roach, 150 Mass. 140.

[9] Lee *v.* Percival, 85 Iowa, 639.

trading name, and in such cases the signature A. B. is the signature of P. Q. Thus a corporation may trade under a partnership name,[1] or the name of an officer,[2] or a partnership under the name of an individual.[3] This presents one case, therefore, where parol proof may always be given to charge a person whose (true) name does not appear upon the negotiable instrument; and, as this exception exists, it seems it would be improper to sustain a demurrer to a complaint alleging the agency, since "*non constat* but the plaintiff may be able to bring his case under that exception."[4] At common law a husband may adopt as his own the indorsement made by his wife in her name upon a bill or note payable to her order, and in such a case her signature is his signature.[5] It has been suggested that a bank adopts the name of its cashier as its trading name in the drawing and indorsing of negotiable paper, but the cases are easily explainable without resorting to this assumption.[6]

§ 191. Same. — (2) Construction from signature aided by recitals in the instrument.

5. The body of the instrument may contain recitals as to the identity of the principal or the fact of the agency which, taken with the signature of the maker or drawer, will either,— (*a*) render the obligation clearly that of the principal, or (*b*) render the instrument so ambiguous as to raise a case for interpretation or construction by the court, or (*c*) render the instrument so ambiguous as to let in parol evidence to explain it. It is in the treatment of this class of instruments that the greatest diversity of views prevails. A few illustrations are given to show the nature of the problem.

(*a*) The following has been said to be clearly the obliga-

[1] Melledge *v.* Boston Iron Co., 5 Cush. (Mass.) 158.

[2] Devendorf *v.* West Virginia, &c. Co., 17 W. Va. 135.

[3] Rumsey *v.* Briggs, 139 N. Y. 323; Bank *v.* Monteath, 1 Denio (N. Y.), 402.

[4] Tarver *v.* Garlington, 27 S. C. 107.

[5] Hancock Bank *v.* Joy, 41 Me. 568.

[6] *Post*, § 194. *Cf. dictum* in Robinson *v.* Kanawha Valley bank, 44 Oh. St. 441, 448.

tion of the principal: "We, as trustees (or we, trustees) of the P. Q. Co., promise," etc., (signed) "A. B., C. D., trustees of the P. Q. Co." [1] But the same recital with the signature "A. B., C. D., trustees," was held to be the individual obligation of the signers.[2] This is a very refined distinction, and of doubtful utility. In another case it was held that a like recital in an instrument signed "A. B., C. D.," with no official description was clearly the obligation of the principal, but this construction was, perhaps, aided by statute.[3] (*b*) Cases falling under this head are only a phase of those just considered. But that the obligation is not clearly that of either the principal or the agent is shown by the fact that one court will hold practically the same instrument to bind the principal, while another court will hold it to bind the agent, and a third to be so ambiguous as to admit parol evidence.[4] Where a note reads "we promise to pay for the P. Co.," and is signed "A. B., C. D., trustees," it is held to be the obligation of the signers personally.[5] (*c*) The following have been said to be so ambiguous as to let in parol evidence: "The P. Q. Co. promises," etc., (signed) "A. B., Gen. Supt.;" [6] "The directors of the P. Q. Co. promise," etc., (signed) "A. B., C. D.," with no additional words indicating agency;[7] "Pay to the order of the P. Q. Co.," etc., (signed) "A. B., President P. Q. Co." [8]

§ 192. Same. — (3) Construction from signature aided by marginal heading or memoranda.

6. The margin of the instrument may contain headings or memoranda disclosing the identity of the principal, or the fact

[1] Barlow *v.* Congregational Society, 8 Allen (Mass.), 460; Blanchard *v.* Kaull, 44 Cal. 440; New Market Savings Bank *v.* Gillet, 100 Ill. 254.

[2] Powers *v.* Briggs, 79 Ill. 493. *Contra*, Barlow *v.* Congregational Society, *supra;* Aggs *v.* Nicholson, 1 H. & N. 165.

[3] Simpson *v.* Garland, 72 Me. 40.

[4] Compare, for example, Simpson *v.* Garland, *supra*, with Pack *v.* White, 78 Ky. 243, and McKensey *v.* Edwards, 88 Ky. 272.

[5] Allan *v.* Miller, 22 L. T. R. 825. See also Bradlee *v.* Boston Glass Manufactory, 16 Pick. (Mass.) 347.

[6] Frankland *v.* Johnson, 147 Ill. 520.

[7] McKensey *v.* Edwards, 88 Ky. 272.

[8] Kean *v.* Davis, 21 N. J. L. 683.

of the agency, which, taken with the signature of the maker or drawer, will raise a case for interpretation. But there is the widest divergence in the decisions as to the effect of the interpretation.

(*a*) *Headings.* It has been held that negotiable instruments headed with the name and, possibly, address of the principal and signed "A. B., agent," or "president," "secretary," etc., is the obligation of the principal whose name is thus disclosed upon the instrument.[1] But other cases are to the contrary.[2] And where one agent of the principal so named draws upon another signing "A. B., agent," and the latter accepts, signing "C. D., agent," the acceptor is personally bound since the force of the heading is exhausted in qualifying the liability of the drawer.[3] In the leading case of Mechanics' Bank *v.* Bank of Columbia,[4] the instrument was headed "Mechanics' Bank of Alexandria" and signed "Wm. Paton, Jr.," with no words indicative of agency. The court held the instrument ambiguous and admitted parol evidence to explain it. Had the signature been followed by the word "cashier," it would have been held unequivocally the obligation of the bank.[5] This case is the origin of a vague doctrine that the signature of a cashier stands upon a different footing from that of other agents, but clearly it is to be explained in accordance with the rule governing an ambiguity appearing on the face of the instrument.

(*b*) *Marginal memoranda.* It has been held that negotiable instruments with the name of the principal across the end, and signed "A. B., agent," or "president," "treasurer," etc., are the obligations of the principal whose name is thus disclosed upon the instrument.[6] But the contrary decision

[1] Hitchcock *v.* Buchanan, 105 U. S. 416; Olcott *v.* Tioga R. R. Co., 27 N. Y. 546.

[2] *Cf.* Casco Nat. Bk. *v.* Clark, 139 N. Y. 305.

[3] Slawson *v.* Loring, 5 Allen (Mass.), 340.

[4] 5 Wheat. (U. S.) 326.

[5] Mr. Justice Lamar in Falk *v.* Moebs, 127 U. S. 597, 606.

[6] Carpenter *v.* Farnsworth, 106 Mass. 561; Chipman *v.* Foster, 119 Mass. 189.

has been reached in other cases,[1] though with a suggestion that the result might have been otherwise had the action been between the original parties.[2]

§ 193. Same. — Acceptors of bills of exchange.

The above illustrations cover mainly the cases of makers of promissory notes and drawers of bills of exchange, as to whom, in these matters, there is no distinction.[3] We have yet to consider the cases of acceptors of bills of exchange and indorsers of bills or notes.

A bill of exchange is drawn upon some designated person, known as the drawee. If he accepts the bill he is bound as acceptor, and the mere fact that he adds "agent," or "president," "treasurer," etc., after his signature will not render his unnamed principal liable. The following will illustrate the phases of this question:

(1) The bill may be drawn on "A. B." and accepted by "A. B.;" or drawn on "A. B., agent," and accepted by "A. B., agent;" or drawn on "A. B., agent of P. Q.," and accepted by "A. B., agent of P. Q." In the first two cases there is general agreement that, in the absence of recitals or other indications of the identity of the principal, A. B. alone is bound.[4] In the third case there is disagreement, one case holding the obligation clearly that of the agent,[5] and another holding parol evidence admissible to explain it.[6] But there seems to be no more reason for giving the term "agent of P. Q." any different construction here than when added to the signature of a maker or drawer.

(2) The bill may be drawn on "A. B." and accepted by "P. Q. by A. B., agent." Here clearly A. B. is not bound. But neither is P. Q., because P. Q. is not the drawee, and

[1] Casco Nat. Bk. *v.* Clark, 139 N. Y. 305; First N. B. *v.* Wallis, 150 N. Y. 455.

[2] *Ante*, § 189.

[3] Tucker Mfg. Co. *v.* Fairbanks, 98 Mass. 101.

[4] Mare *v.* Charles, 5 El. & Bl. 978; Slawson *v.* Loring, 5 Allen (Mass.), 340.

[5] Moss *v.* Livingston, 4 Comst. (4 N. Y.) 208.

[6] Shelton *v.* Darling, 2 Conn. 435; Laflin, &c. Co. *v.* Sinsheimer, 48 Md. 411.

only the drawee can accept.[1] But if in such a case the bill is accepted "A. B. as agent of P. Q.," or "A. B. for P. Q.," it seems that the agent is bound, because where a bill is drawn on an agent personally, and he accepts it in his own name, he is liable, even though he indicates that he is signing for or on behalf of a principal.[2]

(3) The bill may be drawn on "P. Q." and accepted by "A. B., agent." Here it would seem that only P. Q. is liable, for as only the drawee can accept, it is clear that "A. B., agent," is to be read "A. B., agent for the drawee."[3] In any event A. B. is not liable because the bill is not drawn upon him, and only the drawee can accept.[4]

(4) The bill may be drawn on "A. B., agent," etc., but may bear other marks indicating that A. B. is the agent of the drawer. This is held to be the case where a bill is drawn by "The P. Q. Co., by C. D., Pres't," upon "A. B., Treas.," with a direction to charge to the account of the company.[5] But it is difficult to reconcile the cases upon this point.[6]

§ 194. Same. — Indorsers of bills and notes.

In the case of indorsers of bills and notes the whole doctrine of terms *descriptio personæ* seems to have broken down. The indorsement of the payee or subsequent holder is necessary to transfer the title to the paper; the addition of the term "agent" is indicative that the indorsement is in a representative capacity for that purpose; and the courts have practically arrived at the conclusion that where the instrument is payable to "A. B., agent," and indorsed "A. B., agent," that it may be shown that A. B. was acting as agent for an unnamed principal: for example, "A. B., treasurer;"[7] "A. B.,

[1] Walker *v.* Bank, 9 N. Y. 582.
[2] Nicholls *v.* Diamond, 9 Ex. 154; Jones *v.* Jackson, 22 L. T. R 828.
[3] Soughegan Nat. Bk. *v.* Boardman, 46 Minn. 293, 296 (*dictum*).
[4] Okell *v.* Charles, 34 L. T. R. 822.
[5] Hager *v.* Rice, 4 Colo. 90.
[6] Robinson *v.* Kanawha Valley Bank, 44 Oh. St. 441.
[7] Babcock *v.* Beman, 11 N. Y. 200; Soughegan Nat. Bk. *v.* Boardman, 46 Minn. 293.

agent of the P. Q. Co.;"[1] "A. B., cashier."[2] And some cases have gone to the length of holding that in a note payable to "A. B., sec. and treas.," signed "P. Q. Co., A. B., sec. and treas.," and indorsed "A. B., sec. and treas.," the indorsement was conclusively that of the P. Q. Co.[3]

The courts have not always distinguished between cases involving the liability of a maker or drawer or acceptor, and cases involving the liability of a payee indorser, and needless "anarchy" has resulted from the confusion.[4] The distinction is, however, a valid one and is supported by the decisions. Indeed, the supposed distinction between "A. B., cashier," and "A. B., agent," is largely if not wholly explained by the fact that most of the cases holding the signature "A. B., cashier," to be the signature of the bank of which A. B. is shown to be cashier, are cases of indorsement;[5] where this was not the case the instrument bore the name of the bank upon the margin;[6] or it was a case in which the bank brought suit upon a bill or note in which "A. B., cashier," was named as payee.[7]

§ 195. Same. — Summary.

It will be seen that the vexed question is, what creates an ambiguity on the face of an instrument? In their desire to render negotiable instruments certain, and to avoid deciding that an ambiguity exists, the courts have reached exactly opposite conclusions as to the legal effect of practically

[1] Vater *v.* Lewis, 36 Ind. 288; Nichols *v.* Frothingham, 45 Me. 220.

[2] First Nat. Bk. *v.* Hall, 44 N. Y. 395.

[3] Falk *v.* Moebs, 127 U. S. 597.

[4] See Falk *v.* Moebs, 127 U. S. 597, 606. See Grafton N. B. *v.* Wing, 172 Mass. 513.

[5] Bank of Genesee *v.* Patchin, 13 N. Y. 309, s. c. 19 N. Y. 312; Bank of New York *v.* Bank of Ohio, 29 N. Y. 619; Folger *v.* Chase, 18 Pick. (Mass.) 63; Garland *v.* Dover, 19 Me. 441; Houghton *v.* First Nat. Bk., 26 Wis. 663; Bank of the State *v.* Wheeler, 21 Ind. 90; Arnold *v.* Swenson, (Tex.) 44 S. W. 870.

[6] Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. (U. S.) 326; *ante*, § 192.

[7] Baldwin *v.* Bank, 1 Wall. (U. S.) 234; Nave *v.* First Nat. Bk., 87 Ind. 204; *ante*, § 135.

identical instruments. No stronger evidence is needed to prove that such an instrument is ambiguous. If reasonable men may differ as to the meaning of an instrument, a case of ambiguity is raised which should be determined by the aid of extrinsic evidence. The following rules seem to be justified by an examination and comparison of the cases: —

(1) An ambiguity is not created merely by words descriptive of agency added to the signature, *except* (*a*) where there are two signatures and the one with the descriptive words follows the other, and (*b*) in cases of indorsement.

(2) An ambiguity may be created by recitals or marginal memoranda, disclosing the name of the principal, which, if read with the signature and its descriptive words, would leave a reasonable doubt as to which party is intended to be charged.

(3) An ambiguity is created by merely descriptive words following an indorsement.

(4) Parol evidence is always admissible to show that the principal does business under the name of the agent.

3. *Where both Principal and Agent are bound.*

§ 196. (I) Undisclosed principal.

Where an agent contracts in his own name, whether by parol or in writing (other than sealed or negotiable instruments), for an undisclosed principal, both the agent and the principal are liable, and the third party may elect which he will hold.[1] Even where a negotiable instrument is given by the agent in his own name, the payee by disregarding the instrument may proceed against the principal upon the original consideration.[2] But a principal is not undisclosed merely because he is not named; if the third person knows the agent is acting for a particular principal, and there is no specific contract binding the agent personally, the sole remedy will be

[1] Simon *v.* Motivos, 3 Burr. 1921; Royce *v.* Allen, 28 Vt. 234; Argersinger *v.* Macnaughton, 114 N. Y. 535; Pierce *v.* Johnson, 34 Conn. 274. As to what constitutes an election, see *ante*, § 126.

[2] Pentz *v.* Stanton, 10 Wend. (N. Y.) 271.

against the principal.[1] It is not enough, however, to exonerate the agent that the third person discovers the existence and identity of the principal before the contract is performed if the principal was unknown when the contract was made.[2] Of course the third person might then make an election to hold the principal, but the evidence of such election must be convincing.[3]

If the third person knows that the agent is acting for some principal, but does not know who the principal is, the agent is liable as well as the principal,[4] unless he contracts in such form as to rebut the presumption of personal liability.[5] Even where he contracts "as agent for my principals," or "as agent for owners," it may be shown that by custom the agent undertakes a person liability.[6]

§ 197. (II) Simple contract so executed as to render agent liable.

If an agent contracts personally in a simple written contract, he is personally liable even though his principal is disclosed and may, at the option of the other contracting party, also be held liable. Whether the agent has contracted personally depends upon the intention of the parties as disclosed by the terms of the contract and the attendant circumstances. A written contract may be that of the principal alone, that of the agent alone, or that of both principal and agent. In the first case only the principal is bound;[7] in the second case only the agent is bound by the terms of the written instrument, but parol evidence is admissible to show that the principal is also bound, but not to show that the agent is not bound;[8] in the third case both are bound by the

[1] Chase *v.* Debolt, 7 Ill. 371; Boston, &c. R. *v.* Whitcher, 1 Allen (Mass.), 497; Johnson *v.* Armstrong, 83 Tex. 325.

[2] Forney *v.* Shipp, 4 Jones' L. (N. C.) 527.

[3] Hutchinson *v.* Wheeler, 3 Allen (Mass.), 577.

[4] Hobhouse *v.* Hamilton, 1 Hog. 401; Cobb *v.* Knapp, 71 N. Y. 348.

[5] Southwell *v.* Bowditch, 1 C. P. D. 374.

[6] Hutchinson *v.* Tatham, L. R. 8 C. P. 482; Pike *v.* Ongley, 18 Q. B. D. 708; Fleet *v.* Murton, L. R. 7 Q. B. 126; *cf.* Waddell *v.* Mordecai, 3 Hill (S. C.), 22.

[7] *Ante*, § 182.

[8] *Ante*, § 123.

very terms of the instrument,[1] but only according to the terms.[2]

The rule as concerns parol evidence is that it may be introduced to fix liability upon an unnamed principal, but not to exonerate an agent who has made himself liable by the terms of the contract. This rests upon the consideration that such evidence, introduced for the first purpose, does not contradict the written agreement, but merely shows that it also binds another, whereas, if offered for the second purpose, it does contradict the written agreement by seeking to establish that the agreement does not bind him whom it purports to bind.[3]

"A principal may be charged upon a written parol executory contract entered into by an agent in his own name, within his authority, although the name of the principal does not appear in the instrument, and was not disclosed, and the party dealing with the agent supposed that he was acting for himself, and this doctrine obtains as well in respect to contracts which are required to be in writing, as to those where a writing is not essential to their validity. It is, doubtless, somewhat difficult to reconcile the doctrine here stated with the rule that parol evidence is inadmissible to change, enlarge, or vary a written contract, and the argument upon which it is supported savors of subtlety and refinement. . . . Whatever ground there may have been originally to question the legal soundness of the doctrine referred to, it is now too firmly established to be overthrown, and I am of the opinion that the practical effect of the rule as now declared is to promote justice and fair dealing."[4]

"But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow

[1] Young *v.* Schuler, 11 Q. B. D. 651.

[2] Oglesby *v.* Yglesias, El. Bl. & El. 930.

[3] Jones *v.* Littledale, 6 A. & E. 486; Higgins *v.* Senior, 8 M. & W. 834; Cream City Glass Co. *v.* Friedlander, 84 Wis. 53; Leake on Cont. (3d ed.) p. 413; *ante*, § 123.

[4] Briggs *v.* Partridge, 64 N. Y. 357. See also Waddill *v.* Sebree, 88 Va. 1012.

parol evidence to contradict the written agreement, which cannot be done."[1]

The construction of written contracts is for the court, where there is no ambiguity to be explained by parol evidence.[2] If the contract is executed by the agent in his own name, and there be nothing in the instrument to qualify the effect of such signature, the agent is held to have contracted personally.[3] The mere addition to the signature of the term "agent," or the mere description of himself as agent in the body of the written instrument, creates no presumption that he did not intend to contract personally.[4] Terms may be inserted, however, negativing the idea of personal liability. Thus, "we have sold you on account of J. M. & Co.," signed in the agents' own names, does not create a personal liability against the agents.[5] On the other hand the signature might clearly be apt to bind the principal and not the agent, and yet be so qualified by the terms of the contract itself as to render the agent liable.[6]

§ 198. (III) Effect of custom.

Where an agent contracts, though as agent, in a capacity or business where, by custom, the agent is usually liable, the agent and the principal are both presumptively liable and the third party may elect which he will hold. The clearest case of this kind is that of the master of a ship who, when contracting within his authority, binds both himself and the owner according to the custom of the maritime law,[7] though the effect of the custom may be overcome by proof of contrary intent.[8] The custom of trade may be shown in other cases to impose liability upon the agent.[9]

[1] Higgins *v.* Senior, 8 M. & W. 834.

[2] Norton *v.* Herron, 1 C. & P. 648; McCollin *v.* Gilpin, 6 Q. B. D. 516.

[3] Parker *v.* Winlow, 7 El. & Bl. 942; Paice *v.* Walker, L. R. 5 Ex. 173 (but see Gadd *v.* Houghton, L. R. 1 Ex. D. 357, where Paice *v.* Walker is doubted); Brown *v.* Bradlee, 156 Mass. 28.

[4] *Ibid.*; Walker *v.* Bank, 9 N. Y. 582.

[5] Gadd *v.* Houghton, 1 Ex. Div. 357; Ogden *v.* Hall. 40 L. T. R. 751.

[6] Lennard *v.* Robinson, 5 El. & Bl. 125; *cf.* Heffron *v.* Pollard, 73 Tex. 96.

[7] The Salacia, 32 L. J. Adm. 41; Sydnor *v.* Hurd, 8 Tex. 98.

[8] James *v.* Bixby, 11 Mass. 34.

[9] Pike *v.* Ongley, 18 Q. B. D. 708

It has also been held that although an agent has so contracted as to bind his principal alone, yet proof of custom may be introduced to show that the agent is also liable unless such proof is repugnant to the express terms of the writing. These cases, however, are those where the principal is not specifically named, as where the agent contracts "as agent for owner," or "as agent for our principals."[1]

§ 199. (IV) Interest in subject-matter.

Where an agent has an interest in the subject-matter of the contract, the agent and the principal are both liable, and the third party may elect which he will hold. Such is the case where an auctioneer sells goods, for he has a special property in the goods and could maintain an action for the price. It follows that he is liable personally for refusing to accept the highest bid,[2] or for refusing to deliver the goods in his possession sold by him for a disclosed principal,[3] or for failing to give authority to enter and take the property sold;[4] but he does not warrant title.[5]

4. *Where neither Principal nor Agent is bound.*

§ 200. (I) Revocation of authority by death.

Where the agent's authority, unknown to him, has been revoked by the death of his principal, and subsequent to such revocation he makes a contract in behalf of the former principal, no one is bound by the contract: not the estate of the principal, because the agency is revoked;[6] not the agent, because there is a presumption that those who deal with an agent assume the risk that the authority may be terminated by death.[7]

[1] *Ante*, p. 250, note 6.

[2] Warlow *v.* Harrison, 1 El. & El. 309.

[3] Woolfe *v.* Horne, 2 Q. B. D. 355.

[4] Wood *v.* Baxter, 49 L. T. R. 45.

[5] *Ibid.*

[6] Blades *v.* Free, 9 B. & C. 167; Long *v.* Thayer, 150 U. S. 520; *ante*, § 71.

[7] Farmers', &c. Co. *v.* Wilson, 139 N. Y. 284; Smout *v.* Ilbery, 10 M. & W. 1; Carriger *v.* Whittington, 26 Mo. 311.

§ 201. (II) Disclosure of facts affecting authority.

Where an agent discloses to a third party all the material facts affecting the scope of his authority, and with full knowledge of such facts the third party enters into a contract with the principal through the agent, which contract is in excess of the agent's authority, no one is bound: neither the principal, for he never authorized the contract; nor the agent, for he never warranted his authority.[1] An agent's liability on a contract executed in the name of his principal rests on the implied warranties as to the existence and competence of his principal, and the sufficiency of the authority.[2] But clearly no such warranty can be implied when the third party is as fully informed of all the facts as is the agent himself.

§ 202. (III) Insufficiency of form.

Where the agent contracts in the name of his principal and within the scope of his authority, but employs an insufficient form of contract, no one is bound: not the principal, for the contract cannot be enforced, and not the agent, for he cannot be said to warrant the sufficiency of the form of the contract.[3]

If the defect be that an agent of a corporation has attached his own seal instead of the corporate seal, it seems that while the agent is not liable, the corporation may be held accountable in an action of assumpsit for benefits conferred.[4]

5. *Special Case of Public Agents.*

§ 203. Public agents.

The rules governing the liabilities of a private agent are not generally applicable to public agents. There is a strong

[1] Lilly *v.* Smales, 1892, 1 Q. B. 456; Michael *v.* Jones, 84 Mo. 578; Ware *v.* Morgan, 67 Ala. 461; Newman *v.* Sylvester, 42 Ind. 106; Hall *v.* Lauderdale, 46 N. Y. 70; Snow *v.* Hix, 54 Vt. 478.

[2] See *ante*, § 183.

[3] Abbey *v.* Chase, 6 Cush. (Mass.) 54; Hopkins *v.* Mehaffy, 11 S. & R. (Pa.) 126; Neufeld *v.* Beidler, 37 Ill. App. 34. See Beattie *v.* Lord Ebury, L. R. 7 Ch. App. 777.

[4] Whitford *v.* Laidler, 94 N. Y. 145; McCaulley *v.* Jenney, 5 Houst. (Del.) 32.

presumption that a public agent does not intend to bind himself personally, or to become a party to the contract. Even a contract under seal, made in the name of a public agent, will be construed to be the contract of the government and not of the agent, where, in case of a private agency, such a result would be impossible;[1] *a fortiori* if the contract be not under seal.[2] But the presumption in the agent's favor may be overcome by clear proof of an intent to render himself personally liable.[3]

There seems to be no good reason why the same indulgence should not be granted to public officers who sign negotiable instruments, adding words descriptive of their office, and several cases have distinctly decided that such officers are entitled to the usual presumption.[4] But the doctrine is overlooked or questioned in other cases.[5]

Some cases make a further distinction to the effect that the presumption does not extend in any case to the officers of a municipality or town which is capable of making contracts for itself and is liable to be sued thereon.[6]

A public agent is not liable for breach of implied warranty of authority, since no warranty will be implied in such cases.[7]

6. *Liability of Agent in Quasi-contract.*

§ 204. Money paid to agent by mistake or fraud.

An agent is liable to a third party in quasi-contract under the following circumstances: —

[1] Hodgson *v.* Dexter, 1 Cranch (U. S.), 343; Knight *v.* Clark, 48 N. J. L. 22.

[2] Macbeath *v.* Haldimand, 1 T. R. 172; Walker *v.* Swartwout, 12 Johns. (N. Y.) 443; Savage *v.* Gibbs, 4 Gray (Mass.), 601; Parks *v.* Ross, 11 How. (U. S.) 362.

[3] Clutterbuck *v.* Coffin, 3 M. & G. 842; Auty *v.* Hutchinson, 6 C. B. 266; Simonds *v.* Heard, 23 Pick. (Mass.) 120; Brown *v.* Bradlee, 156 Mass. 28.

[4] Monticello *v.* Kendall, 72 Ind. 91; Sanborn *v.* Neal, 4 Minn. 126 McClellan *v.* Reynolds, 49 Mo. 312.

[5] Cahokia *v.* Rautenberg, 88 Ill. 219; Wing *v.* Glick, 56 Iowa, 473.

[6] Providence *v.* Miller, 11 R. I. 272; Brown *v.* Bradlee, *supra.*

[7] Dunn *v.* Macdonald, 1897, 1 Q. B. 401.

(1) Where the third party has paid money to the agent, as agent, from a mistake of fact, or upon a consideration which fails, and notice is given the agent before he pays the money over to his principal, or otherwise changes his legal position on the strength of such payment, the agent is liable to the third person.[1] But if the agent has paid the money over to his principal, or has changed his legal position to his detriment upon the strength of the payment, he is not liable.[2] If the agent has not acted as agent, but for an undisclosed principal, the case escapes the doctrines of agency and is treated like any case of payment of money by mistake.[3]

(2) Where the third party is induced by the fraud of the agent to pay him money, he may recover the money from the agent, whether the latter has paid it over to his principal or not.[4] The same result follows if an agent receives for his principal money which the law forbids him to receive, as from an insolvent debtor.[5] If the duress or fraud is that of the principal and not the agent, the latter would be protected by a payment in good faith to the former.[6]

(3) Where the third party pays the money to the agent through compulsion or extortion, even though no notice has been given and the agent has paid the money to the principal, an action may be brought against the agent for its recovery.[7] But where the third party pays the money voluntarily, or

[1] Buller *v.* Harrison, Cowp. 565; Cox *v.* Prentice, 3 M. & Sel. 344; La Farge *v.* Kneeland, 7 Cow. (N. Y.) 456; Cabot *v.* Shaw, 148 Mass. 459; Shepard *v.* Sherin, 43 Minn. 382; O'Connor *v.* Clopton, 60 Miss. 349; Smith *v.* Binder, 75 Ill. 492.

[2] Holland *v.* Russell, 4 B. & S. 14; Ellis *v.* Goulton, 1893, 1 Q. B 350; U. S. *v.* Pinover, 3 Fed. Rep. 305; Fry *v.* Lockwood, 4 Cow. (N. Y.) 454.

[3] Newall *v.* Tomlinson, L. R. 6 C. P. 405; Smith *v.* Kelly, 43 Mich. 390.

[4] Snowdon *v.* Davis, 1 Taunt. 359; Smith *v.* Sleap, 12 M. & W. 585; Moore *v.* Shields, 121 Ind. 267; Larkin *v.* Hapgood, 56 Vt. 597.

[5] Larkin *v.* Hapgood, 56 Vt. 597; *Ex parte* Edwards, 13 Q. B. D. 747.

[6] Owen *v.* Cronk, 1895, 1 Q. B. 265.

[7] Elliott *v.* Swartwout, 10 Pet. (U. S.) 137.

where a personally innocent agent has before notice paid the money over to the principal, the agent is not liable.[1]

§ 205. Money received to the use of the third party.

(4) Where the agent has received money from his principal to be paid to the third party, and undertakes with such party so to pay it, but instead converts it to his own use, the third party may, at his election, proceed against the agent as for money had and received to his use.[2] But he is not liable in such case unless he has agreed expressly or impliedly to pay the third person.[3] An election to hold the agent is final and discharges the principal from further liability.[4] If the agent after receiving the money promises to pay the third party, he is liable upon his promise, and "No consideration need pass as between the agent and the creditor. The funds in his hands are a sufficient consideration for his agreement."[5] And it has been held that if the third party requests the agent to pay to X the money which the principal directed the agent to pay to the third party, and the agent agrees to do so, X may maintain an action against the agent. "An action for 'money had and received' is a most liberal action, and may be as comprehensive as a bill in equity."[6] This falls under the doctrine of a "promise for the benefit of a third person," and escapes the general doctrine as to privity of contract.[7]

7. *Liability of Third Person to Agent.*

§ 206. Introduction.

Since the agent may be liable, either solely, or in common with the principal, on contracts entered into in behalf of the

[1] Owen *v.* Cronk, 1895, 1 Q. B. 265.

[2] Crowfoot *v.* Gurney, 9 Bing. 372; Walker *v.* Rostron, 9 M. & W. 411; Keene *v.* Sage, 75 Me. 138; Beach *v.* Ficke, 94 Iowa, 283.

[3] Howell *v.* Batt, 5 B. & A. 504; Malcolm *v.* Scott, 5 Ex. 601; Baron *v.* Husband, 4 B. & A. 611.

[4] Beach *v.* Ficke, *supra*.

[5] Goodwin *v.* Bowden, 54 Me. 424.

[6] Keene *v.* Sage, *supra*.

[7] *Ante*, § 118.

latter, it should follow that the contractual obligation is reciprocal and that the third person is also liable to the agent. Such is found to be the case. The right of the agent to sue the third person may be treated under the following classes: —

1. Where the agent alone may sue.
2. Where the agent or principal may sue, but the principal may control the suit.
3. Where the agent or principal may sue, but the principal cannot control the suit.

§ 207. (I) Where the agent alone may sue.

1. *Sealed instruments.* Where an agent contracts in his own name in a sealed instrument, he alone can sue upon it.[1] But it seems that any defence good against his principal may be set up in such suit, since the action, though in the name of the agent, is for the benefit of the principal.[2] So also any defence good against the agent may be set up, even if it would not be good against the principal in case he could sue in his own name.[3] It follows that the third party may avail himself of any defence or set-off that would be good against either principal or agent, for he is entitled to defend against the party of record, and he is equally entitled to defend against the one for whose use the action is brought.

2. *Negotiable instruments.* It is also a technical rule of the law merchant that if the agent is named as the payee of a negotiable instrument, he alone can sue upon it.[4] As already pointed out, this technical rule has very generally been ignored in cases where there is any indication by the addition of the word "agent," or its equivalent, that the

[1] *Ante*, §§ 134, 188; Shack *v.* Anthony, 1 M. & S. 573; Berkeley *v.* Hardy, 5 B. & C. 355; Clarke *v.* Courtney, 5 Pet. (U. S.) 319.

[2] Bliss *v.* Sneath, 103 Cal. 43; *cf.* Isberg *v.* Bowden, 8 Ex. 852, which must be regarded as inapplicable where equitable defences are permitted.

[3] Gibson *v.* Winter, 5 B. & A. 96.

[4] §§ 135, 194; United States Bank *v.* Lyman, 20 Vt. 666; Fuller *v.* Hooper, 3 Gray (Mass.), 334; Grist *v.* Backhouse, 4 Dev. & B. (N. C.) 362; Cocke *v.* Dickens, 4 Yerg. (Tenn.) 29.

payee is a representative of an unnamed principal.[1] This is especially true of instruments payable to one described as "cashier."[2] The technical rule itself can give little real difficulty, since the payee may by indorsement confer an unquestioned right upon the principal to maintain the action.

3. *Right restricted to agent.* Where the right to sue on a contract is by its express terms restricted to the agent, he alone can sue.[3]

4. *Ostensible agent really principal.* Where one contracts as an agent, but is in reality the principal, he may sue upon the contract, provided after knowledge of the fact that he is the real principal the third party recognizes him as principal,[4] or in case the identity of the principal is not a controlling consideration in the contract,[5] and due notice of the facts has been given to the third party before action is brought.[6] It has been held, however, that where a memorandum is signed by brokers as agents for an unnamed principal, and they afterward declare themselves as principals, the memorandum so signed does not satisfy the Statute of Frauds.[7] But where the agent James represented that he was the principal John, and made and executed a contract in the name of John, it was held in an action by John that the Statute of Frauds was satisfied.[8] If the agent intends and professes to contract for a principal and not for him-

[1] *Ante*, § 135.

[2] First N. B. *v.* Hall, 44 N. Y. 395.

[3] *Ante*, § 133; Humble *v.* Hunter, 12 Q. B. 310; Lucas *v.* De la Cour, 1 M. & S. 249.

[4] Rayner *v.* Grote, 15 M. & W. 359.

[5] Schmaltz *v.* Avery, 16 Q. B. 655, where plaintiff contracted in his own name "as agent for the freighter," and the court held that as the supposed freighter was not named, the defendants could not have contracted with reference to his solvency or credit.

[6] Bickerton *v.* Burrell, 5 M. & S. 383.

[7] Sharman *v.* Brandt, L. R. 6 Q. B. 720. There are some expressions in this case indicating that the ostensible agent could not sue because the contract was not made with him.

[8] Hunter *v.* Giddings, 97 Mass. 41.

self, the fact that the principal is non-existent or under disability does not make the agent a contracting party.[1]

A distinction has been stated between cases where the ostensible agent names a principal, and where he asserts his agency but does not name his principal.[2] In the first case it is said the ostensible agent cannot sue because clearly there was no intention to give credit to him,[3] while in the second case he may sue because there was at least no intention manifested to give credit to any other person.[4] It is admitted, however, that even in the first case the agent may sue if the contract has been performed by him with the acquiescence of the third party,[5] and it has been suggested that the same result would follow if the agent, before bringing the action, gives due notice of the actual state of the facts.[6]

§ 208. (II) Where either agent or principal may sue.

The agent or the principal may sue on contracts made by the agent on behalf of his principal, — (1) where, the agent contracts personally,[7] or (2) where the agent has a special property in the subject-matter of the contract or a beneficial interest in it.[8]

(1) Where the agent and principal are both bound on the contract,[9] the primary right to maintain an action against the third party is in the principal, but, subject to his assent express or tacit,[10] the agent may maintain an action

[1] Hollman *v.* Pullin, 1 C. & E. 254.

[2] Dicey on Parties (Am. ed.), Rules 18 and 19, pp. 164–168; Mecham on Agency, § 760.

[3] Compare Boulton *v.* Jones, 2 H. & N. 564; Boston Ice Co. *v.* Potter, 123 Mass. 28.

[4] Schmaltz *v.* Avery, *supra.*

[5] Rayner *v.* Grote, *supra.*

[6] Bickerton *v.* Burrell, 5 M. & S. 383; Foster *v.* Smith, 2 Cold. (Tenn.) 474.

[7] *Ante*, §§ 196–198.

[8] *Ante*, § 199.

[9] *Ante*, § 196 *et seq.*

[10] Sadler *v.* Leigh, 4 Camp. 194.

wherever an action could be maintained against the agent.[1] "It is a well-established rule of law that when a contract not under seal, is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue. If the agent sues, it is no ground of defence that the beneficial interest is in another, or that the plaintiff, when he recovers, will be bound to account to another. . . . The agent's right is, of course, subordinate to and liable to the control of the principal, to the extent of his interest. He may supersede it by suing in his own name, or otherwise suspend or extinguish it, subject only to the special right or lien which the agent may have acquired."[2] The right of the agent to sue ceases with the termination of the agency, whether the agency is terminated by the act of the parties or by operation of law.[3]

These cases are those in which the agent contracts in his own name, but in behalf of his principal, the contract not being under seal, or a negotiable instrument, or expressly restricted to the agent.[4]

In these cases the right of the agent to sue ceases upon the intervention of the principal, and a settlement with the principal is a good defence to an action by the agent.[5]

The right of the agent to sue does not pass to his assignee in bankruptcy where the agent has no beneficial interest in the contract.[6]

The third party may avail himself of any defence or set-

[1] Joseph *v.* Knox, 3 Camp. 320; Gardiner *v.* Davis, 2 C. & P. 49; Cooke *v.* Wilson, 1 C. B. N. S. 153; U. S. Tel. Co. *v.* Gildersleeve, 29 Md. 232; Ludwig *v.* Gillespie, 105 N. Y. 653. This right is not taken away by code provisions requiring actions to be brought in the name of the real party in interest. Albany, &c. Co. *v.* Lundberg, 121 U. S. 451; Harrigan *v.* Welch, 49 Mo. App. 496; Rowe *v.* Rand, 111 Ind. 206.

[2] Rhoades *v.* Blackiston, 106 Mass. 334.

[3] Miller *v.* State Bank of Duluth, 57 Minn. 319.

[4] *Ante*, §§ 123, 196–199.

[5] Sadler *v.* Leigh, 4 Camp. 195; Atkinson *v.* Cotesworth, 3 B. & C. 647; Dickenson *v.* Naul, 4 B. & A. 638.

[6] Rhoades *v.* Blackiston, 106 Mass. 334.

off good against the agent, as well as any good against his principal.[1]

§ 209. (III) Same. — Where principal cannot control the suit.

(2) Where the agent has a special property in or lien upon the subject-matter of the contract,[2] he may maintain an action in his own name free from the control of the principal,[3] at least to the extent of his interest. But such an interest must exist in order to give the agent a right of action;[4] though this will be presumed where the agent is one who usually has such an interest, as an auctioneer[5] or factor.[6] The measure of damages is the same whether the suit be brought in the name of the agent or in that of the principal.[7] A settlement with the principal cannot be pleaded as a defence to the agent's action[8] unless the agent has led the third person to believe that he acquiesces in such settlement.[9]

§ 210. Liability in quasi-contract.

Where the agent has paid money by mistake to the third party, he may maintain an action for its recovery. It seems either the principal or the agent may sue,[10] and as the agent is liable to the principal for negligence in the conduct of the business, this may be the only way in which the agent can protect himself against loss.[11]

[1] Smith *v.* Lyon, 3 Camp. 465; Gibson *v.* Winter, 5 B. & A. 96.

[2] *Ante*, § 199.

[3] Chitty on Pleading, p. 8; Drinkwater *v.* Goodwin, Cowp. 251; Rowe *v.* Rand, 111 Ind. 206; Thompson *v.* Kelly, 101 Mass. 291.

[4] Fairlie *v.* Fenton, L. R. 5 Ex. 169. (Brokers do not usually have such interest.)

[5] Williams *v.* Millington, 1 H. Bl. 81; Minturn *v.* Main, 7 N. Y. 220.

[6] Drinkwater *v.* Goodwin, Cowp. 251; Groover *v.* Warfield, 50 Ga. 644.

[7] Evrit *v.* Bancroft, 22 Oh. St. 172.

[8] Atkyns *v.* Amber, 2 Esp. 493; Robinson *v.* Rutter, 4 El. & Bl. 954.

[9] Grice *v.* Kenrick, L. R. 5 Q. B. 340.

[10] Stevenson *v.* Mortimer, Cowp. 805; Oom *v.* Bruce, 12 East, 225; Holt *v.* Ely, 1 El. & Bl. 795.

[11] Kent *v.* Bornstein, 12 Allen (Mass.), 342.

CHAPTER XVI.

TORTS BETWEEN AGENT AND THIRD PARTY.

§ 211. Agent liable for misfeasance.

An agent is personally liable to third persons for loss or damage occasioned to them by his misfeasance when acting on behalf of his principal, whether the act or omission constituting the misfeasance was authorized or not.[1] It is no defence to allege his principal's orders, or that he acted in good faith believing his principal had directed only what might lawfully be done.[2] "The warrant of no man, not even the king himself, can excuse the doing of an illegal act, for although the commanders are trespassers, so are also the persons who did the fact."[3] It is immaterial that the agent derives no personal benefit from the wrong.[4]

§ 212. Whether agent liable for non-feasance.

An agent is not liable to a third person for a mere non-feasance, or not doing at all that which he has agreed with his principal to do. This is merely another way of stating that no one can sue for a breach of duty except the one to whom the duty is owing.[5] The first problem in such cases is

[1] Cullen *v.* Thomson, 4 Macq. 424; Swift *v.* Jewsbury, L. R. 9 Q. B. 301; Campbell *v.* Hillman, 15 B. Mon. (Ky.) 508; Weber *v.* Weber, 47 Mich. 569; Hamlin *v.* Abell, 120 Mo. 188.

[2] Bates *v.* Pilling, 6 B. & C. 38; Mill *v.* Hawker, L. R. 10 Ex. 92; Lee *v.* Mathews, 10 Ala. 682; Williams *v.* Merle, 11 Wend. (N. Y.) 80.

[3] Sands *v.* Child, 3 Lev. 352. See also Whitfield *v.* Lord Le Despencer, 2 Cowp. 754. The command of the State is, however, a defence in an action by a subject of a foreign State. Buron *v.* Denman, 2 Ex. 167; Pollock on Torts (5th ed.), pp. 104–109; *post*, § 294.

[4] Weber *v.* Weber, *supra.*

[5] Dicey on Parties (Am. ed.), p. 489; Story on Agency, § 309; Lane *v.* Cotton, 12 Mod. 472; Delaney *v.* Rochereau, 34 La. An. 1123.

to ascertain whether any duty is owing to any other person than the principal, or specifically to the third person injured by the non-feasance.

Whether an act or omission resulting in injury to a third person is a mere non-feasance, or whether it is a misfeasance or breach of duty toward a third person, involves distinctions of a subtle character.[1] This matter will be more fully treated in a subsequent section.[2]

§ 213. Special instances of misfeasance.

(1) *Fraud.* An agent is personally liable for his own frauds committed in the course of the agency, although committed for the principal's benefit.[3] "A person cannot avoid responsibility merely because he gets no personal advantage from his fraud. All persons who are active in defrauding others are liable for what they do, whether they act in one capacity or another. . . . While it may be true that the principal is often liable for the fraud of his agent though himself honest, his own fraud will not exonerate his fraudulent agent."[4] It is, of course, necessary that the essential elements of deceit should be present in order to found an action in tort. Therefore if the agent makes the representation believing it to be true, he is not guilty of fraud, although his principal may have known it to be false.[5] But if he knows it to be false, then whether his principal knew it or not, and whether it was authorized or unauthorized, he is liable.[6]

(2) *Conversion.* "Any person who, however innocently,

[1] Delaney *v.* Rochereau, *supra;* Osborne *v.* Morgan, 130 Mass. 102; Baird *v.* Shipman, 132 Ill. 16.

[2] *Post*, § 291.

[3] Swift *v.* Jewsbury, L. R. 9 Q. B. 301; Campbell *v.* Hillman, 15 B. Mon. (Ky.) 508; Hedden *v.* Griffin, 136 Mass. 229; Allen *v.* Hartfield, 76 Ill. 358; Clark *v.* Lovering, 37 Minn. 120; Hamlin *v.* Abell, 120 Mo. 188.

[4] Weber *v.* Weber, 47 Mich. 569.

[5] Eaglesfield *v.* Londonderry, 38 L. T. 303; 26 W. R. 540. See *ante*, § 152.

[6] Pollock on Torts (5th ed.), pp. 290–294; Hempfling *v.* Burr, 59 Mich. 294.

obtains possession of goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of conversion."[1] Accordingly an agent is bound to know that his principal has title to the goods which form the subject-matter of the agency. "He who assumes to deal or intermeddle with personal property which is not his own must see to it that he has a warrant therefor from some one who is authorized to give it."[2] If an agent sells stolen bonds for the thief and pays the proceeds over to his principal, he is liable to the true owner for conversion, and it is no defence that he acted innocently or that the bonds were negotiable.[3] So if one act innocently as the agent of one of two joint owners of a chattel and sell the entire chattel without the consent of the other joint owner, he is liable for conversion.[4]

A doubt was expressed by some of the judges in the case of *Hollins* v. *Fowler*[5] whether the rule was as broad as is above stated, and one American case at least has held that a factor is not liable for selling stolen goods unless after demand or notice.[6] But the weight of authority sustains the rule.[7]

The agent is therefore liable to the true owner if, having possession of the latter's goods, although believing them to belong to the principal, he sells and delivers them,[8] or unqualifiedly refuses to deliver them up to the true owner upon demand.[9] But if he have not possession, a mere contract to sell is not a conversion.[10] So also a mere transportation of

[1] Hollins *v.* Fowler, L. R. 7 H. L. 757.

[2] Spraights *v.* Hawley, 39 N. Y. 441.

[3] Kimball *v.* Billings, 55 Me. 147; Swim *v.* Wilson, 90 Cal. 126.

[4] Perminter *v.* Kelly, 18 Ala. 716.

[5] L. R. 7 H. L. 757.

[6] Roach *v.* Turk, 9 Heisk. (Tenn.) 708. And see Leuthold *v.* Fairchild, 35 Minn. 99, 111.

[7] Hoffman *v.* Carow, 20 Wend. 21, s. c. 22 Wend. 285; Rice *v.* Yocum, 155 Pa. St. 538; Robinson *v.* Bird, 158 Mass. 357.

[8] Consolidated Co. *v.* Curtis, 1892, 1 Q. B. 495.

[9] Alexander *v.* Southey, 5 B. & Ald. 247; Spraights *v.* Hawley, 39 N. Y. 441.

[10] Barker *v.* Furlong, 1891, 2 Ch. 172.

the goods for the possessor is not a conversion, where it results only in a change of position and not of property or possession.[1]

(3) *Other wrongs.* An agent is personally liable for an illegal use of process,[2] malicious prosecution,[3] libel,[4] infringement of patent,[5] or other act of misfeasance.

§ 214. Whether principal and agent are liable jointly.

The question as to whether the principal and agent may be sued jointly has given rise to some discussion. Two classes of cases are distinguishable:

(1) Where the principal and agent are in fact joint tort feasors, as where the principal commands the wrong to be done, and therefore purposely participates in it, the two may be sued jointly.[6] They are in no different position than any other joint tort-feasors. In trespass all participants are regarded as joint tort-feasors.[7] If there are two or more principals, one or all or any number may be joined.[8]

(2) Where the principal and agent are not in fact joint wrong-doers, but the principal's liability rests upon the ground of public policy heretofore explained,[9] there is a difference of opinion as to whether the two are liable jointly. As stated above, if both are liable in trespass, they are regarded as joint wrong-doers; but if the principal is liable in an action on the case, simply because of his position as principal, it has been held that a joint action would not lie.[10] But it is believed that the weight of authority is otherwise, and that in any

[1] Metcalf *v.* McLaughlin, 122 Mass. 84; Gurley *v.* Armstead, 148 Mass. 267.

[2] Bennett *v.* Bayes, 5 H. & N. 391.

[3] Wallace *v.* Finberg, 46 Tex. 35; Green *v.* Elgie, 5 Q. B. 99.

[4] Maloney *v.* Bartley, 3 Camp. 210.

[5] Nobel's Exp. Co. *v.* Jones, 8 App. Cas. 5.

[6] Moore *v.* Fitchburg R., 4 Gray (Mass.), 465.

[7] Hewett *v.* Swift, 3 Allen (Mass.), 420.

[8] Roberts *v.* Johnson, 58 N. Y. 613.

[9] *Ante*, §§ 148–150.

[10] Parsons *v.* Winchell, 5 Cush. (Mass.) 592; Campbell *v.* Portland Sugar Co., 62 Me. 552, 566.

case where an action would lie against the two severally it will lie against them jointly.[1]

§ 215. Liability of third person to agent for torts.

The third person is liable to the agent for torts committed against him; but the torts that may be committed against him as agent are not numerous.

(1) Where the agent has a special property in the goods which form the subject-matter of the agency, he may maintain an action for an injury to the goods or for their conversion. In such cases he is both bailee and agent, and it is a general rule of law that a bailee, or a possessor having a special property in the goods, may maintain an action against such as injure or take away the chattel.[2] Indeed it is not clear that anything more than possession is necessary to sustain the action.[3]

(2) Where the agent is engaged in the sale of a specific article, his compensation being by way of commission on his sales, a false and libellous statement concerning such articles, which diminishes his sales and profits, will found an action against the one making the statement.[4]

(3) We have already seen that the principal may maintain an action against any one who unjustifiably induces the agent to quit the employment.[5] In the same way, and for the same reasons, the agent may maintain an action against any one who induces the principal to dismiss him from the employment.[6]

[1] Dicey on Parties (Am. ed. 1879), 490; Stevens *v.* Midland R., 10 Ex. 352; Phelps *v.* Wait, 30 N. Y. 78; Shearer *v.* Evans, 89 Ind. 400; *cf.* White *v.* Sawyer, 16 Gray (Mass.), 586.

[2] Moore *v.* Robinson, 2 B. & A. 817; Fitzhugh *v.* Wiman, 9 N. Y. 559, 567; Little *v.* Fossett, 34 Me. 545; Robinson *v.* Webb, 11 Bush (Ky.), 464, 483.

[3] Pollock on Torts (5th ed.), pp. 313–321; Donahoe *v.* McDonald, 92 Ky. 123.

[4] Weiss *v.* Whittemore, 28 Mich. 366.

[5] *Ante*, § 176. See also § 159.

[6] *Post*, § 299; Chipley *v.* Atkinson, 23 Fla. 206; *cf.* Allen *v.* Flood, 1898, App. Cas. 1.

BOOK II.

MASTER AND SERVANT.

INTRODUCTION.

§ 216. Scope of the subject of master and servant.

A servant is a representative vested with authority to perform operative acts for his master. He is not vested with authority, as servant, to create new primary obligations. He may, however, in the course of the employment, commit a breach of the existing primary obligations of his master and thus give rise to the secondary obligation to pay damages. If the primary obligation was an involuntary one, or if, being voluntary, it was one to which the law annexed additional involuntary ones, we call the breach of it a tort.[1]

The chief subject-matter of the law of master and servant is tort. A servant in performing operative acts for his master may wilfully or inadvertently cause injury to the person or property of a third person, and such third person may be a stranger to the service or may be a fellow-servant. The main problem of the law of master and servant is to determine the nature and extent of the master's liability for such torts. Other problems concern themselves with the liability of the master for his own personal torts resulting in injury to a servant, with the liability of a servant for his own torts, and with the criminal liability of a master for the offences of his servant. But the central problem is the nature and extent of a master's liability for the tortious acts or omissions of his servant resulting in injury to a stranger or to another servant.

At the outset, however, it is necessary to determine that the relation of master and servant actually exists, and this, so far as not already treated,[2] calls for preliminary discussion.

In discussing the matters characteristic of the law of master and servant, we shall, without needlessly traversing the

[1] *Ante*, §§ 4–6.

[2] *Ante*, Part I.

ground already covered in this work, address ourselves to the following inquiries: —

I. Who is a servant; that is, when does the relation of master and servant exist in fact, so that the master is liable for any of the acts or omissions of the servant?

II. For what acts or omissions of a servant resulting in injury to a third person is the master liable? In connection with this we shall inquire to what extent a master is liable criminally, if at all, for offences committed by his servant. We shall also inquire whether the doctrine of *respondeat superior* is applicable to public officers and bodies.

III. For what acts or omissions of a servant resulting in injury to a fellow-servant is the master of the two servants liable? In connection with this we shall inquire for what personal acts or omissions of his own resulting in injury to a servant the master is liable.

IV. To what extent is a servant liable for his own torts resulting in injury to strangers or to fellow-servants?

V. For what torts affecting the relation is a third person liable either to the master or the servant?

PART I.

WHO IS A SERVANT?

§ 217. Introductory.

We have already noted the distinction between a servant and an agent.[1] We have now to inquire whether one who is performing operative or ministerial acts for another is in the conventional relation of a servant to a master or whether (1) he is an independent contractor; (2) his services have or have not been transferred to a new master; (3) he is compulsorily employed or in compulsory service; (4) he is a subservant or a volunteer.

[1] *Ante*, §§ 4–6.

CHAPTER XVII.

INDEPENDENT CONTRACTORS.

§ 218. General rule.

A distinction is taken between a servant and an independent contractor. When a person desires a particular act done he may either hire a workman to do it, retaining control of the servant and directing his work, or he may let the job by contract, simply stipulating that it shall be done in accordance with certain specifications, but retaining no control over the contractor, or over his methods of work. In the first case the workman is a servant; in the second, he is an independent contractor. In the first case the employer is legally responsible for the acts of the employee done in the course of the business; in the second, he is not generally responsible for such acts.

Whether the employer retains such control over the work to be done, and the manner of doing it, as to render himself responsible for injuries occasioned by the negligence of the employee (or contractor) in the performance of the work depends upon the construction to be given to the contract.[1]

Subject to the exceptions below enumerated, one who lets a contract for work and retains no control over the work, or the methods of doing it, is not liable for the negligence or other wrong of the contractor.[2]

To this general rule there are several exceptions.[3]

[1] Linnehan *v.* Rollins, 137 Mass. 123.

[2] Lawrence *v.* Shipman, 39 Conn. 586; Blake *v.* Ferris, 5 N. Y. 48; Hexamer *v.* Webb, 101 N. Y. 377; Atlanta R. Co. *v.* Kimberly, 87 Ga. 161; Foster *v.* Wadsworth-Howland Co., 168 Ill. 514; Singer Mfg. Co. *v.* Rahn, 132 U. S. 518; Halliday *v.* Nat. Tel. Co., 1891, 1 Q. B. 221. See Sadler *v.* Henlock, 4 E. & B. 570; Brackett *v.* Lubke, 4 Allen (Mass.), 138, for cases open to doubt.

[3] See various exceptions stated in Atlanta R. *v.* Kimberly, 87 Ga.

§ 219. Exceptions: (1) selecting competent contractor.

It is sometimes stated that a person may be liable for the negligence of an independent contractor if he did not use reasonable care to select one competent to perform the work contracted for.[1] There are occasional *dicta* to this effect,[2] and perhaps one or two cases involving to some extent an affirmation of the doctrine; but there are some cases squarely denying the doctrine.[3] It is urged that the exception to the general rule, if once admitted, would run counter to business customs under which a contractor may estimate and contract for work and afterward sub-let it to others who are specialists, would go far toward destroying the whole doctrine applicable to independent contractors, and would "open a new and unlimited field for actions for negligence."[4] It is urged on the other hand that the exception imposes on one having work performed only a duty which he fairly owes to the public or to adjoining owners.[5]

§ 220. Exceptions: (2) contracting for nuisance.

If the employer contracts for a nuisance or other unlawful act, he remains liable to any person injured in consequence of the performance of the contract.[6] Perhaps the exception is even broader than this. In one case it is stated, by way of *dictum*, to be this: "If a contractor faithfully performs his contract, and a third person is injured by the contractor, in the course of its due performance, or by its result, the employer is liable, for he causes the precise act to be done which

161; Lawrence *v.* Shipman, 39 Conn. 586; Engel *v.* Eureka Club, 137 N. Y. 100, 104; Berg *v.* Parsons, 156 N. Y. 109, 115.

[1] Berg *v.* Parsons, 90 Hun (N. Y.), 267 (overruled in 156 N. Y. 109, three judges dissenting); Norwalk Gaslight Co. *v.* Norwalk, 63 Conn. 495, 528-529; Brannock *v.* Elmore, 114 Mo. 55; Sebeck *v.* Plattdeutsche Volkfest Verein, 64 N. J. L. 624.

[2] Lawrence *v.* Shipman, 39 Conn. 586.

[3] Berg *v.* Parsons, 156 N. Y. 109; Schip *v.* Pabst Brewing Co., 64 Minn. 22.

[4] *Ibid.*

[5] Dissenting opinion in Berg *v.* Parsons, 156 N. Y. 109.

[6] Ellis *v.* Sheffield Gas Consumers Co., 2 E. & B. 767; Deford *v.* State, 30 Md. 179; Ketcham *v.* Newman, 141 N. Y 205.

occasions the injury."[1] Whichever rule more correctly states the exception, it is at least true that where the contract calls for the doing of an act that is itself wrongful, the employer remains liable for all the consequences, practically as a joint tort-feasor with the contractor.

§ 221. Exceptions: (3) contracting for unsafe result.

If the employer contracts for improper materials or an unsafe plan, or generally an unsafe result, he remains liable for damages occasioned thereby although the work is done by an independent contractor.[2] "The owner cannot dictate that his building be constructed of improper materials or upon an unsafe plan, and escape liability for injuries caused thereby because he made a contract with a third person to build it."[3]

§ 222. Exceptions: (4) statutory liability to conduct work efficiently.

If the employer is under an obligation of positive law to do a particular thing, or to observe particular safeguards, he cannot relieve himself of this liability by putting the work into the hands of an independent contractor.[4] Thus, if he is empowered by statute to construct a bridge, but to have it open for navigation within a specified time, he is not relieved of liability for obstructing navigation because the independent contractor failed to observe the terms of the contract.[5] If a permit to place building material in the street is coupled with a condition that it be lighted and guarded, the lot owner is liable for the failure of a contractor to light and guard material deposited there.[6]

The rule under this head has been extended to cases where a railroad is by statute authorized to construct its road across

[1] Lawrence *v.* Shipman, 39 Conn. 586.

[2] Gorham *v.* Gross, 125 Mass. 232.

[3] Meier *v.* Morgan, 82 Wis. 289.

[4] Hole *v.* Sittingbourne R. Co., 6 H. & N. 488; 30 L. J. Ex. 81; Reuben *v.* Swigart, 7 Oh. Dec. 638; Downey *v.* Low, 22 N. Y. App. Div. 460.

[5] Hole *v.* R. Co., *supra.*

[6] Reuben *v.* Swigart, *supra.*

a highway, and by the negligence of an independent contractor the highway is rendered unsafe, even though the statute does not expressly require the railroad to observe particular safeguards.[1]

§ 223. Exceptions: (5) contract liability to conduct work safely.

If the employer by express contract has agreed to do an act efficiently and safely, he cannot, by sub-letting the work to an independent contractor, relieve himself from liability under his express contract. Thus where a company undertook to lay water-pipes in a city, and agreed with the city to protect all persons from damages and to be responsible for damages to all persons, and afterward sub-let the work to a contractor, who in using a steam-drill injured a traveller, it was held that the company was liable.[2] But where a license was given by a city to a landowner to construct a sewer on condition that the work be guarded and lighted, and that the licensee should be answerable to any person injured by the failure so to do, it was held that the licensee was not liable for such neglect on the part of an independent contractor.[3]

§ 224. Exceptions: (6) extra-hazardous work.

If the work to be executed is extra-hazardous, and such that in the natural course of things injurious consequences are likely to ensue, unless suitable means are adopted to prevent such consequences, the employer is liable unless he uses due care in the adoption of such means.[4]

This exception to the general rule has not met with universal favor. It has been applied in the cases just cited to the excavation of lands endangering the support of adjoining

[1] Deming *v.* Terminal Ry. Co., 49 N. Y. App. Div. 493.

[2] Water Company *v.* Ware, 16 Wall. 566.

[3] Blake *v.* Ferris, 5 N. Y. 48.

[4] Bower *v.* Peate, L. R. 1 Q. B. D. 321; 45 L. J. Q. B. 446; Black *v.* Christchurch Finance Co., 1894, A. C. 48; Thompson *v.* Lowell, &c. Ry., 170 Mass. 577; Cameron *v.* Oberlin, 19 Ind. App. 142; Norwalk Gaslight Co. *v.* Norwalk, 63 Conn. 495; Bonaparte *v.* Wiseman, 89 Md. 12; Covington, &c. Bridge Co. *v.* Steinbrock, 61 Oh. St. 215; Wetherbee *v.* Partridge, 175 Mass. 185.

occasions the injury."[1] Whichever rule more correctly states the exception, it is at least true that where the contract calls for the doing of an act that is itself wrongful, the employer remains liable for all the consequences, practically as a joint tort-feasor with the contractor.

§ 221. Exceptions: (3) contracting for unsafe result.

If the employer contracts for improper materials or an unsafe plan, or generally an unsafe result, he remains liable for damages occasioned thereby although the work is done by an independent contractor.[2] "The owner cannot dictate that his building be constructed of improper materials or upon an unsafe plan, and escape liability for injuries caused thereby because he made a contract with a third person to build it."[3]

§ 222. Exceptions: (4) statutory liability to conduct work efficiently.

If the employer is under an obligation of positive law to do a particular thing, or to observe particular safeguards, he cannot relieve himself of this liability by putting the work into the hands of an independent contractor.[4] Thus, if he is empowered by statute to construct a bridge, but to have it open for navigation within a specified time, he is not relieved of liability for obstructing navigation because the independent contractor failed to observe the terms of the contract.[5] If a permit to place building material in the street is coupled with a condition that it be lighted and guarded, the lot owner is liable for the failure of a contractor to light and guard material deposited there.[6]

The rule under this head has been extended to cases where a railroad is by statute authorized to construct its road across

[1] Lawrence *v.* Shipman, 39 Conn. 586.

[2] Gorham *v.* Gross, 125 Mass. 232.

[3] Meier *v.* Morgan, 82 Wis. 289.

[4] Hole *v.* Sittingbourne R. Co., 6 H. & N. 488; 30 L. J. Ex. 81; Reuben *v.* Swigart, 7 Oh. Dec. 638; Downey *v.* Low, 22 N. Y. App. Div. 460.

[5] Hole *v.* R. Co., *supra.*

[6] Reuben *v.* Swigart, *supra.*

a highway, and by the negligence of an independent contractor the highway is rendered unsafe, even though the statute does not expressly require the railroad to observe particular safeguards.[1]

§ 223. Exceptions: (5) contract liability to conduct work safely.

If the employer by express contract has agreed to do an act efficiently and safely, he cannot, by sub-letting the work to an independent contractor, relieve himself from liability under his express contract. Thus where a company undertook to lay water-pipes in a city, and agreed with the city to protect all persons from damages and to be responsible for damages to all persons, and afterward sub-let the work to a contractor, who in using a steam-drill injured a traveller, it was held that the company was liable.[2] But where a license was given by a city to a landowner to construct a sewer on condition that the work be guarded and lighted, and that the licensee should be answerable to any person injured by the failure so to do, it was held that the licensee was not liable for such neglect on the part of an independent contractor.[3]

§ 224. Exceptions: (6) extra-hazardous work.

If the work to be executed is extra-hazardous, and such that in the natural course of things injurious consequences are likely to ensue, unless suitable means are adopted to prevent such consequences, the employer is liable unless he uses due care in the adoption of such means.[4]

This exception to the general rule has not met with universal favor. It has been applied in the cases just cited to the excavation of lands endangering the support of adjoining

[1] Deming *v.* Terminal Ry. Co., 49 N. Y. App. Div. 493.

[2] Water Company *v.* Ware, 16 Wall. 566.

[3] Blake *v.* Ferris, 5 N. Y. 48.

[4] Bower *v.* Peate, L. R. 1 Q. B. D. 321; 45 L. J. Q. B. 446; Black *v.* Christchurch Finance Co., 1894, A. C. 48; Thompson *v.* Lowell, &c. Ry., 170 Mass. 577; Cameron *v.* Oberlin, 19 Ind. App. 142; Norwalk Gaslight Co. *v.* Norwalk, 63 Conn. 495; Bonaparte *v.* Wiseman, 89 Md. 12; Covington, &c. Bridge Co. *v.* Steinbrock, 61 Oh. St. 215; Wetherbee *v.* Partridge, 175 Mass. 185.

property, to an exhibition of marksmanship, to the clearing of land by fire, to the removal of dangerous walls, and to blasting.

It has been rejected in the case of a contract for blasting,[1] for an exhibition of balloon ascension,[2] and for the setting of fires.[3]

§ 225. Exceptions: (7) safety of premises.

If the owner of property contracts for work to be done upon it, he is, as to invitees, bound to keep the premises in a safe condition and cannot excuse himself on the ground that the work is under the exclusive control of a contractor.[4] The rule extends to the protection of pedestrians in a public way injured by inadvertently falling into unguarded excavations adjacent to the sidewalk,[5] and to the protection of users of a highway against defective overhanging structures.[6]

The early case of *Bush* v. *Steinman*[7] carried this doctrine to the extreme point of holding that where work is done on an owner's premises he ought to reserve control over the methods, and if he does not, is liable for all results. The case has been unfavorably commented upon in England and America, and is probably not now law.[8]

§ 226. Exceptions: (8) interference by employer.

If the employer reserves the right to interfere with the method of work, and to direct and control, the employer is substantially a master and remains liable under the usual doctrines applicable to master and servant.[9] If the employer,

[1] Berg *v.* Parsons, 156 N. Y. 109. See M'Namee *v.* Hunt, 87 Fed. R. 298.

[2] Smith *v.* Benick, 87 Md. 610.

[3] St. Louis, &c. R. *v.* Yonley, 53 Ark. 503.

[4] Curtis *v.* Kiley, 153 Mass. 123; Coughtry *v.* Globe Woolen Co., 56 N. Y. 124.

[5] Wiggin *v.* St. Louis, 135 Mo. 558.

[6] Tarry *v.* Ashton, L. R. 1 Q. B. D. 314.

[7] 1 B. & P. 404.

[8] Reedie *v.* London & N. W. Ry., 4 Exch. 244, 256; Pollock on Torts (5th ed.), p. 76, note *h*: Blake *v.* Ferris, 5 N. Y. 48, 62-64. See also Strauss *v.* City of Louisville (Ky.), 55 S. W. 1075.

[9] Linnehan *v.* Rollins, 137 Mass. 123.

having reserved no right to interfere, does in fact interfere, and the injury complained of is the natural result of such interference, the employer is liable.[1] In the one case he is still the master and liable as such for the negligence of his servants; in the other case he is himself the actor and liable for the natural and probable results of his own acts.

§ 227. Resumption of control by owner.

After the work of the contractor is completed and the owner resumes control of his property he is, of course, liable for its safe condition. It is sometimes a nice question whether the owner has resumed control, but this is essentially a question of fact and not of law.[2]

[1] Lawrence *v.* Shipman, 39 Conn. 586, 590; Berg *v.* Parsons, 156 N. Y. 109, 115; Atlanta R. *v.* Kimberly, 87 Ga. 161, 168.

[2] Read *v.* East Providence Fire Dist., 20 R. I. 574; Higgins *v.* W. U. Tel. Co., 156 N. Y. 75.

CHAPTER XVIII.

TRANSFER OF SERVICE.

§ 228. General rule.

The general servant of one may be put temporarily at the service of another and the question then arises whether he is for the time being the servant of that other. The cases upon this are not entirely harmonious and it seems hardly possible to extract from them a satisfactory test. In general it may be said that if the transfer of service is complete so as to give the transferee the unqualified control of the servant, the transferee becomes for the time the master of the servant so as to render him liable for the servant's wrongful acts and to give him the benefit of the fellow-servant rule.[1] While this rule may fairly be regarded as stating the law of the decided cases, it must be noted that in applying it, the courts have reached divergent results upon essentially similar facts.

§ 229. Hiring horses and driver.

Where one hires horses and carriage with a driver from a livery-stable keeper, the driver is the servant of the livery-stable keeper and not of the hirer.[2] The hirer is not liable for the driver's negligence, nor is the negligence of the driver imputable to the hirer so as to bar the latter's recovery in case he is injured by the combined negligence of the driver and some third person. Neither is the driver a fellow-servant of a servant of the hirer. The hirer may recover from the owner for the negligent management of the vehicle resulting in injury to him.[3]

[1] Rourke *v.* White Moss Colliery Co., L. R. 2 C. P. D. 205; Donovan *v.* Laing, L. R. 1893, 1 Q. B. 629; Hasty *v.* Sears, 157 Mass. 123; Hardy *v.* Shedden Co., 78 Fed. Rep. 610; Gagnon *v.* Dana, 69 N. H. 264.

[2] Little *v.* Hackett, 116 U. S. 366; New York, L. E. & W. R. *v.* Steinbrenner, 47 N. J. L. 161; Lewis *v.* Long Island R., 162 N. Y. 52, 66.

[3] But where one hires a horse, carriage, and driver, to be used in tak-

From this typical case there are two variations.

First, the hirer may own his own carriage and hire horses with a driver. This was the case of *Laugher* v. *Pointer*,[1] in which the court was evenly divided. In the later case of *Quarman* v. *Burnett*,[2] where the hirer not only hired the horses and a driver, but also furnished a special livery for the driver, the doubts left open in the prior case were settled in favor of the view that the coachman was not the servant of the hirer. The doctrine of this case has been followed in many subsequent English and American cases.[3]

In a recent case the hirer owned a hoisting tackle affixed to his warehouse, and a truckman sent a horse and driver to do some hoisting. Owing to the negligence of a servant of the hirer the driver was injured. It was held that the driver was the servant of the truckman and not a fellow-servant of the negligent employee.[4] "The plaintiff represented his general master, the truckman, and was all the time his servant, and did not become in any legal sense the servant of the defendant any more than he would if employed to move the goods to a railway station on the truck, and if not such servant he could not, of course, have become the co-servant of the defendant's regular workman."

But where a truckman hired a truck and team and driver to another, and the latter built upon the truck a superstructure for seats which broke and injured the driver, it was held that

ing out goods for exhibition and sale, the owner of the carriage is not liable for the loss of the goods which the hirer or his agent leaves unguarded in the carriage, even though the driver leave the carriage unattended while the hirer is absent. Abrahams *v.* Bullock, 17 T. L. Rep. 557.

[1] 5 B. & C. 547. The case was afterwards heard by twelve judges, but the decision is unreported. It is known that the judges were divided, but whether equally is not clear. See remarks of Lord Russell of Killowen in Jones *v.* Scullard, 1898, 2 Q. B. 565, 570.

[2] 6 M. & W. 499.

[3] Jones *v.* Corporation of Liverpool, L. R. 14 Q. B. D. 890; Joslin *v.* Grand Rapids Ice Co., 50 Mich. 516; Huff *v.* Ford, 126 Mass. 24; Reagan *v.* Casey, 160 Mass. 374; Burton *v.* G. H. & S. R., 61 Tex. 526.

[4] Murray *v.* Dwight, 161 N. Y. 301.

the driver was the hirer's servant and that the truckman was not liable. The case was further put upon the ground that the driver assumed the risk, so far as the truckman was involved, of the increased danger resulting from the act of the hirer in building the superstructure.[1] Referring to the carriage cases cited above the court says: "But the present, we think, is clearly distinguishable from such a case, because here was not the ordinary hiring of a carriage for a trip, but it was the hiring of a truck to be built upon, so that its nature as a vehicle was changed, and then a separate hiring of the means of locomotion."

Second, the hirer may own his own horses and carriage and the livery-stable keeper may furnish a driver. Under these circumstances, it was recently decided that the jury were justified in finding that the driver was the servant of the hirer.[2] "The principle to be extracted from the cases is that, if the hirer simply applies to the livery-stable keeper to drive him between certain points or for a certain period of time, and the latter supplies all necessary for that purpose, the hirer is in no sense responsible for any negligence on the part of the driver. But it seems to me to be altogether a different case where the brougham, the horse, the harness, and the livery are the property of the person hiring the services of the driver. And in such case, especially if, as here, the driver has driven the hirer for a considerable period of time and been approved by him, and the horse is one the characteristics of which neither the livery-stable keeper nor the driver has had any practical opportunity of becoming acquainted with, there is, it seems to me, evidence upon which a jury would be justified in coming to the conclusion that the driver was upon the occasion in question acting as the servant, not of the livery-stable keeper, but of the person who hired him."[3]

[1] Hardy *v.* Shedden Co., 78 Fed. 610.

[2] Jones *v.* Scullard, 1898, 2 Q. B. 565.

[3] Lord Russell of Killowen, C. J., in Jones *v.* Scullard, 1898, 2 Q. B. 565, 574–575.

§ 230. Hiring machine and operator.

Another type of cases upon the transfer of service is made up of instances of the loan or rental of a machine or mechanical device of some sort together with an operator. In such cases the operator is the general servant of the owner of the machine, but may become temporarily the special servant of the hirer. Thus the loan of an engine with an engineer to run it,[1] or of a hoisting crane with a man to operate it,[2] has been held in England to constitute the operator the servant of the hirer where the latter had full control over him. "For some purposes, no doubt, the man was the servant of the defendants [owners of the crane]. Probably, if he had let the crane get out of order by his neglect, and in consequence any one was injured thereby, the defendants might be liable; but the accident in this case did not happen from that cause, but from the manner of working the crane."[3] The cases are distinguished from the "carriage cases" on the ground that the driver of a carriage is not put under the control of the hirer. It has also been held that the engineer and crew of a railroad switching engine operating temporarily upon the private switch of a mill-owner, and under his orders, are the servants for the time of the mill-owner and not of the railroad company.[4] So also where a railroad company lets a contract for the construction of a track and agrees to furnish and does furnish a construction train with an operating crew, the crew are held to be the servants of the constructor, and not of the company.[5] One or two cases holding a different doctrine, and following the "carriage cases," have not met with approval.[6] So also if the owner of a lighter charters the boat and crew to another, he is not liable for the negligence of the captain.[7]

[1] Rourke *v.* White Moss Colliery Co., L. R. 2 C. P. D. 205.

[2] Donovan *v.* Laing, 1893, 1 Q. B. 629. [3] *Ibid.* p. 632.

[4] McInerney *v.* D. & H. Canal Co., 151 N. Y. 411.

[5] Miller *v.* Minnesota & Northwestern Ry., 76 Iowa, 655; Powell *v.* Construction Co., 88 Tenn. 692; Byrne *v.* Kansas City, &c. R., 61 Fed. R. 605.

[6] Burton *v.* G. H. & S. A. Ry., 61 Tex. 526; New Orleans, &c. R. *v.* Norwood, 62 Miss. 565. See also Coggin *v.* Central R. Co., 62 Ga. 685.

[7] Anderson *v.* Boyer, 156 N. Y. 93.

The assent or non-assent of the servant to the transfer of service and the substitution of masters may be an important element in determining whether such transfer is complete, and this question may be so doubtful as to require the verdict of a jury for its determination.[1]

§ 231. Servants sent to work on another's premises.

If the general master is asked to furnish a workman for a particular service, and does furnish the workman, who is sent to work upon the hirer's premises, is the workman the servant of the hirer and a fellow-servant of the hirer's regular workmen? Here, again, the answer must depend upon the facts as to the extent of the hirer's control and the understanding or assent of the workman. Where an employer was asked to send a workman to make repairs upon the hirer's mill or elevator, it was held that the workman was a servant for the time being of the hirer and a fellow-servant of the hirer's regular employees.[2] In both cases it would seem that the workman understood the situation and impliedly submitted himself to the temporary master. In like manner a contractor doing work on another's premises may temporarily borrow an employee of that other under such circumstances as to render the employee temporarily the servant of the contractor.[3]

§ 232. Physicians employed for benefit of servants or passengers.

If a railroad or other company employs a competent physician or surgeon to attend persons injured in its service or business, such physician or surgeon is not the servant of the company and the company is not liable for his negligence or malpractice,[4] even though by law the company is required to

[1] Delaware, Lackawanna, &c. R. Co., *v.* W. R. Hardy, 59 N. J. L. 35.

[2] Ewan v. Lippincott, 47 N. J. L. 192; Hasty *v.* Sears, 157 Mass. 123; Samuelian *v.* American Tool Co., 168 Mass. 12. See also Wyllie *v.* Palmer, 137 N. Y. 248.

[3] Higgins *v.* W. U. Tel. Co., 156 N. Y. 75.

[4] Laubheim *v.* DeK. N. S. Co., 107 N. Y. 228; Secord *v.* Ry., 18 Fed. R. 221; Quinn *v.* R., 94 Tenn. 713; York *v.* Chicago, &c. R., 98 Iowa, 544; Atchison, &c. R. *v.* Zeiler, 54 Kans. 340; Pittsburgh, &c. R. *v.* Sullivan, 141 Ind. 83.

provide a duly qualified medical practitioner.[1] The passenger or employee may avail himself of the services of such practitioner or not, and the company has practically no control over the treatment or care given by the physician to his patient. But where the company deducts a fixed sum from the wages of employees with which to provide hospital facilities and surgeons, it is liable to an employee for damages resulting from its negligence in providing an incompetent surgeon.[2] The liability of charity hospitals is considered hereafter.[3]

§ 233. Sleeping-car porters also servants of railroad company.

It has been held that the conductor and porter of a drawing-room car or a sleeping car are the servants of the railroad company which makes this car a part of its train, although the car is owned and operated by a separate company and the conductor and porter are employees of that company. The negligence or wilful wrongs of such servants as to matters involving the safety or security of passengers, is the negligence or wrong of the railroad company.[4]

[1] Allan *v.* State Steamship Co., 132 N. Y. 91; O'Brien *v.* Cunard Steamship Co., 154 Mass. 272.

[2] Wabash R. *v.* Kelley, 153 Ind. 119. See also Richardson *v.* Carbon Hill Coal Co., 10 Wash. 648; Cummings *v.* Chicago, &c. R., 89 Ill. App. 199.

[3] *Post*, § 261.

[4] Thorpe *v.* N. Y. C. & H. R. R., 76 N. Y. 402; Dwinelle *v.* N. Y. C. & H. R. R., 120 N. Y. 117; Pennsylvania Co. *v.* Roy, 102 U. S. 451; Railroad Co. *v.* Walrath, 38 Oh. St. 461; Williams *v.* Pullman Palace Car Co., 40 La. An. 417.

CHAPTER XIX.

COMPULSORY EMPLOYMENT OR SERVICE.

§ 234. Meaning.

Freedom of choice of servants seems to be necessary in order that the master should be liable for the servants' defaults. Freedom of choice of masters, or at least of service, seems to be necessary in order that the servant should be held to have assumed the risks of his employment. If, therefore, one is compelled by law to accept the services of another, he ought not to be held liable for the injuries occasioned by that other's acts or omissions. If, on the other hand, one is compelled by law to serve another, he ought not to be held to be a fellow-servant of other employees so as to bar him from recovering for their negligence, since the basis of the fellow-servant rule is that the servant in entering the employment voluntarily assumes the risks of the default of fellow-servants. We have then to consider the case of compulsory employment of a servant and the case of the compulsory rendering of services, in determining the question, Who is a servant?

§ 235. Liability for servant compulsorily employed.

In some cases — as in the employment of pilots — the employer is required by law to employ only regularly designated or licensed persons and in some instances is bound to take the first of such persons who presents himself. As the freedom of choice is thus limited — or entirely eliminated — the question arises whether the employee is really the servant of the employer so as to render the latter liable under the usual doctrines applicable to master and servant.

The case of limited selection has generally been decided in accordance with the usual doctrine of master and servant. So long as there is a power of selection, even though among

a small number, the employer chooses his own servant and must remain liable for his acts within the scope of the employment. Thus where the statute required that any barge navigating the Thames should have on board one authorized or licensed bargeman (of whom it appeared there were about six thousand), it was held that a proprietor of a barge was liable for the negligence of one of the licensed bargemen selected by him.[1] And where pilotage statutes are construed as not compulsory, the shipowner is held liable for the negligence of the pilot.[2] Where a mining company is required by law to select an engineer from among those licensed by the state, the company cannot escape liability for the incompetence of an engineer so selected on the plea that the certificate of the state examiners is conclusive as to the holder's competence.[3] But, *contra*, where the company was required to employ a licensed foreman a statute making the company liable for the foreman's negligence was declared unconstitutional.[4]

If the employment of a particular person, or of the first of a class to present himself, is compulsory, the employer is not liable for the misconduct of such person. Thus, it is said that a shipowner is not liable for the negligence of a compulsory pilot, because the pilot is not deemed to be acting as his servant, but as an officer imposed by the state.[5] There are numerous English authorities to support this proposition,[6] and the English statutes now expressly provide that the owner shall not be liable for the acts of the compulsory pilot.[7]

[1] Martin *v.* Temperley, 4 Q. B. 298.

[2] Bussey *v.* Donaldson, 4 Dall. (Pa.) 206; Yates *v.* Brown, 8 Pick (Mass.) 22; Dennison *v.* Seymour, 9 Wend. (N. Y.) 9.

[3] Consolidated Coal Co. *v.* Seniger, 179 Ill. 370, 374–375.

[4] Durkin *v.* Kingston Coal Co., 171 Pa. St. 193.

[5] Story on Agency, § 456 *a*.

[6] The Maria, 1 W. Rob. Adm. 95; Lucey *v.* Ingram, 6 M. & W. 302; The Halley, L. R. 2 P. C. 193. But if the master still remains in control, although compelled to avail himself of the assistance of a pilot, the shipowner is liable. The Guy Mannering, L. R. 7 P. D. 52; The Agnes Otto, L. R. 12 P. D. 56; The Prins Hendrik, 1899, P. 177.

[7] Merchants' Shipping Act, 1894, § 633, replacing § 388 of Act of 1854.

While it has been held by the Supreme Court of the United States that under the maritime law the ship is liable for damages occasioned by the negligence of a compulsory pilot,[1] it has recently been distinctly held that in an action at common law the shipowner is not liable for injuries due to the negligence of a pilot accepted compulsorily.[2]

§ 236. Status of one compelled to serve.

The question concerning pilots also arises when the pilot is injured through the negligence of a member of the crew. In such case is the pilot barred of recovery upon the ground that his injury is due to the negligence of a fellow-servant? Where the statute made the employment of the pilot compulsory and also compelled the pilot to serve, and also fixed the compensation, and further provided that the owner should not be liable for the pilot as for a servant, it was held that the pilot was not a fellow-servant of the crew and could recover for injuries sustained through the negligence of one of them.[3]

If a convict is hired out by the state to an employer, there are two questions: (1) Is the employer liable as master for the torts of such convict? (2) Is the convict a servant within the meaning of the fellow-servant rule?

Upon the first point there would seem to be no difficulty, since the employer has had entire freedom of choice and ought to be liable for the act of the convict in the same way as for the act of any other servant. He is also liable to such servant for defects in machinery or other breach of his duty as master.[4]

Upon the second point the case stands upon a different basis. The convict has had no freedom of choice, has not chosen his master, and ought not to be held, therefore, to have

[1] The China, 7 Wall. (U. S.) 53; Ralli *v.* Troop, 157 U. S. 386, 402; The John G. Stevens, 170 U. S. 113, 120; The Barnstable, 181 U. S. 464. The English decisions are to the contrary.

[2] Homer Ramsdell Transportation Co. *v.* La Compagnie Générale Transatlantique, 21 S. C. Rep. 831.

[3] Smith *v.* Steele, L. R. 10 Q. B. 125.

[4] Hartwig *v.* Bay State, &c. Co., 43 Hun (N. Y.), 425.

assumed any of the risks connected with the service. He is not a fellow-servant of free employees and may therefore recover for injuries occasioned by their negligence.[1] He is not free to refuse obedience to any command, and this want of freedom of action may negative the existence of contributory negligence.[2]

§ 237. Parent and child.

A parent is liable for the torts of his minor children living with him only when he would be liable for the tort of a contract servant under similar circumstances or when he participates in the tort by authorizing or ratifying it. There is no such relation existing between the parent and child as will make the acts of the child any more binding upon the parent than the acts of any other person. Accordingly, if the child commits a tort not in the course of the parent's affairs and neither authorized nor ratified by the parent, the latter is not liable for the consequences of such act.[3] Evidence tending to connect the parent with the wrongful act, as that he had acquiesced in former similar acts of the child upon his premises, is competent and should be received,[4] but this is not on the ground of agency. Since an unemancipated minor child can have no action against his parent for a personal tort,[5] it follows that the question whether a minor child compelled by law to serve his parent is a fellow-servant of other servants of the parent, cannot arise.

§ 238. Husband and wife.

The common law liability of a husband for his wife's torts did not rest upon the doctrine of agency. It extended to a liability for ante-nuptial torts where no such agency could have been predicated.[6] It rested upon the necessity of joining

[1] Buckalew *v.* Tennessee Coal, &c. Co., 112 Ala. 146; Boswell *v.* Barnhart, 96 Ga. 521.

[2] Dalheim *v.* Lemon, 45 Fed Rep. 225, 233.

[3] Tifft *v.* Tifft, 4 Denio (N. Y.), 175; Paul *v.* Hummel, 43 Mo. 119; Brohl *v.* Lingeman, 41 Mich. 711; Baker *v.* Morris, 33 Kans. 580.

[4] Hoverson *v.* Noker, 60 Wis. 511.

[5] Hewlett *v.* George, 68 Miss. 703.

[6] Hawk *v.* Harman, 5 Binney (Pa.), 43.

the husband in all actions against the wife and upon the fact that he became entitled to her personalty and the usufruct of her realty. In cases where he was not, in fact, a participant in the tort, it was necessary to join the wife in the action; but where the tort was committed in the husband's presence and by his command or encouragement, he could be sued alone.[1] A wife could, of course, be a servant in fact and act under authority, and in such case the husband's liability might be put upon the ordinary rule of agency.

Modern statutes which give to married women the control and benefit of their own property and enable them to sue or to be sued alone, have greatly modified the common law doctrine of the husband's liability for his wife's torts.

Since a husband cannot be sued by his wife for a personal tort during the marital relation, or even after divorce for a personal tort committed during the marital relation,[2] it follows that the question whether she is a fellow-servant of other servants of the husband, cannot well arise.

[1] Angel *v.* Felton, 8 Johns. (N. Y.) 149; Kosminsky *v.* Goldberg, 44 Ark. 401.

[2] Phillips *v.* Barnet, 1 Q. B. D. 436; Abbott *v.* Abbott, 67 Me. 304.

CHAPTER XX.

SUB-SERVANTS AND VOLUNTEERS.

§ 239. Sub-servants.[1]

It is generally conceded that, aside from the cases of compulsory employment or compulsory service just considered, one is free to select his own servants, and that in order to create the relation it is necessary to have the consent of both parties, express or implied. Where, therefore, one servant employs a sub-servant to assist him in the master's business, the sub-servant does not become the servant of the master unless the first servant had authority to employ the sub-servant or unless such employment was ratified by the master.[2] Whether such authority may be derived from necessity has already been considered.[3] It has also been pointed out that one may be liable for the consequences of the acts or omissions of those who are not his servants at all upon the doctrine that "where a man is in possession of fixed property, he must take care that it is so used and managed by those whom he brings upon the premises as not to be dangerous to others. In that view he is held liable, not for the negligence of another, but for his own personal negligence in not preventing or abating a nuisance on his own premises."[4] It should also be noted that where a servant employs a sub-servant, liability may attach to the master, not for the mere negligence of the sub-servant, but for the concurring negligence of the servant himself in intrusting the business

[1] See *ante*, §§ 92–95.

[2] Haluptzok *v.* Great Northern Ry., 55 Minn. 446.

[3] *Ante*, § 59; Gwilliam *v.* Twist, 1895, 2 Q. B. 84.

[4] Mitchell, J., in Haluptzok *v.* Great Northern Ry., *supra*. Perhaps Bush *v.* Steinman, 1 Bos. & P., 404, and Althorf *v.* Wolfe, 22 N. Y. 355, may be supported on this theory, though both cases have been much discussed and criticised.

to the sub-servant or in failing to use due care to conduct it himself.[1] In *Althorf* v. *Wolfe*,[2] a servant who had been directed to remove the ice and snow from the roof of his master's house, secured a friend to assist him, and, while both were so engaged, a passer-by was struck by the falling ice and killed. It was held that the owner (master) was liable whether the ice that occasioned the injury was thrown by the servant or his friend. The reasons given are diverse, and the decision may rest upon the idea of implied authority, or of ratification (of which there was some evidence), or of the negligence of the servant in directing or controlling the work, or of the duty of the occupier of premises not to permit his property to become a nuisance.

Whatever other grounds of liability may exist, it is clear upon principle that the master is not liable as master unless the sub-servant has been engaged with his consent, express or implied, or unless he has ratified the engagement, or unless there be established a case of necessity which may, after all, be taken to be merely a case of the enlargement of the authority because of the necessity.[3]

§ 240. Volunteers.

A volunteer is one who, without the request or consent of M or his authorized agent, undertakes to perform a service for M. This may be as a mere interloper or it may be in order to advance some interest of the volunteer or of his master. In the first case the volunteer is essentially a trespasser, or at most a licensee, and his acts cannot bind M,[4] nor can he recover for any injury he may suffer while in the voluntary service.[5] It is immaterial that he may have been requested to assist by a servant of M, provided the servant had no authority to engage assistants.[6] Such request may

[1] Booth *v.* Mister, 7 Car. & P. 66; Althorf *v.* Wolfe, 22 N. Y. 355; Engelhart *v.* Farrant, 1897, 1 Q. B. 240.

[2] 22 N. Y. 355.

[3] Gwilliam *v.* Twist, *supra*.

[4] *Ante*, § 239.

[5] Church *v.* Chicago, &c. Ry., 50 Minn. 218.

[6] Church *v.* Chicago, &c. Ry., *supra*.

save the volunteer from being regarded as a trespasser, but he still assumes all the risks of the temporary service, except that he does not assume the risk of the wanton injury, or an injury recklessly inflicted after knowledge of his dangerous situation.[1]

If, however, the volunteer performs the service at the request of M's servants, but not for M's benefit primarily, but to expedite his own or his master's business, he is not a trespasser and does not assume the risks, and may recover if negligently injured.[2] In such case the volunteer is not M's servant so as to render M liable for his negligence; on the other hand he is in the position of any third person injured by M's servants.

In case the volunteer renders a beneficial service for the alleged master, in his presence or with his knowledge, and is suffered to proceed without dissent, an assent may be implied and the relation of master and servant established to an extent necessary to render the master liable to third persons for the tortious acts of the volunteer done in the course of such service.[3]

[1] Evarts *v.* St. Paul, &c. Ry., 56 Minn. 141.

[2] Eason *v.* S. & E. T. Ry., 65 Tex. 577; Street Ry. *v.* Bolton, 43 Oh. St. 224; Welch *v.* Maine Cent. R., 86 Me. 552.

[3] Hill *v.* Morey, 26 Vt. 178.

PART II.

LIABILITY OF MASTER FOR TORTS AND CRIMES OF SERVANT.

§ 241. Introductory.

The main object of the relation of master and servant is that the servant shall perform operative acts for the master. In so doing the servant may wilfully or negligently injure the person or property of some third person. To determine the grounds of liability in such a case, together with the extent and limits of liability, is one of the problems we have now to consider. We have also to consider whether the liability is the same in case the employer is a public political entity like a state or city, or is a public charity. The servant may, while about his master's business, commit a crime, and we have also to inquire whether the master can be held liable in a criminal prosecution for such offence.

CHAPTER XXI.

LIABILITY OF MASTER TO THIRD PERSONS FOR TORTS OF SERVANT.

§ 242. Conditions of liability.

In order that a master shall be held liable to third persons for torts committed by his servant resulting in injury to them, it must appear:

(I.) That the wrongdoer was in fact the servant of the one sought to be charged with liability;

(II.) That the servant was at the time of the commission of the tort about his master's business;

(III.) That the servant was acting within the course of his employment;

(IV.) If the tort was wilful, either (1) that the servant was acting within the course of the employment and in the furtherance of it, or (2) that the master had voluntarily undertaken toward the injured party the particular obligation broken by the servant and had intrusted the performance of the obligation to the servant who committed the breach of it, or (3) that the master had intrusted the servant with such dangerous instrumentalities that the risk of their wilful misuse ought to rest upon the master.

§ 243. (I.) The wrongdoer must be defendant's servant.

The doctrine of *respondeat superior* rests upon the relation of master and servant. It must therefore appear that such a relation does in fact exist. It does not exist merely because of the relation of parent and child,[1] husband and wife,[2] or employer and employee.[3] It may be that the wrongdoer wa

[1] See *ante*, § 237. [2] See *ante*, § 238.
[3] See *ante*, § 217.

an independent contractor,[1] or a volunteer,[2] in which case, subject to the qualifications hereinbefore mentioned, the employer is not liable for the torts of such persons. It may be that the one sought to be charged has been compelled by law to employ the wrongdoer.[3] It may be that the employer is a public entity or officer or public charity.[4] Or it may be that while the wrongdoer is the general servant of the one sought to be charged there has been such a temporary transfer of service to another as to render the wrongdoer the servant for the time being of the transferee.[5] In all these and other cases the question becomes a vital one whether the one sought to be charged is in fact the responsible master of the wrongdoer.

In some cases there may be a presumption that the wrongdoer was the servant of the one sought to be charged. If the latter is the owner of a vehicle which, by negligent management, has been the cause of injury to another, there is a presumption that the one in charge of the vehicle was the servant of the owner, and the latter has the burden of showing that the relation did not exist.[6] The old notion[7] that if the owner sent a vehicle out with his name upon it he was estopped to deny that the driver was his servant, has been distinctly repudiated.[8]

There are few cases in which estoppel plays any part in the law of master and servant. Yet one may be estopped to deny that another is his servant where by so representing him third persons have been induced to intrust their person or property to his care or treatment.[9]

[1] See *ante*, § 218 *et seq.*

[2] See *ante*, § 240.

[3] See *ante*, § 235.

[4] See *post*, § 257 *et seq.*

[5] See *ante*, § 228 *et seq.*

[6] Norris *v.* Kohler, 41 N. Y. 42; Svenson *v.* Atlantic Mail Steamship Co., 57 N. Y. 108.

[7] See Stables *v.* Eley, 1 C. & P. 614.

[8] Smith *v.* Bailey, 1891, 2 Q. B. 403.

[9] Hannon *v.* Siegel-Cooper Co., 167 N. Y. 244. Defendants represent that they conduct a dentistry establishment. Plaintiff is treated there by S. In an action against defendants for injuries resulting from S's unskilful treatment, it is held that defendants are estopped to deny that S is their servant, or to show that S is an independent contractor.

§ 244. (II.) The servant must be about his master's business.

Obviously one may be in the general service of another and yet at times attend to business or pleasure for himself. Acts done during the time the servant is at liberty cannot render the master liable. A master may lend his horse and vehicle to a servant and give the servant his liberty, and during the time that the servant is using the horse and vehicle for his own ends the master is not liable for the servant's negligence.[1] Nor is he liable if the servant without his consent takes the horse and vehicle for ends of his own.[2] But if the servant while about his master's business makes a slight deviation for ends of his own the master remains liable, as, where the servant drives out of the most direct route for personal ends,[3] or where a pilot diverges from the direct course for ends not connected with his master's business.[4]

"In such cases it is, and must usually remain, a question depending upon the degree of deviation and all the attendant circumstances. In cases where the deviation is slight and not unusual, the court may, and often will, as matter of law, determine that the servant was still executing his master's business. So, too, where the deviation is very marked and unusual, the court in like manner may determine that the servant was not on the master's business at all, but on his own. Cases falling between these extremes will be regarded as involving merely a question of fact, to be left to the jury or other trier of such questions."[5]

Railway workmen who build a fire in order to heat coffee for their dinner are not acting for the railway, and the latter is not liable unless it be the duty of such workmen to guard

[1] Bard *v.* Yohn, 26 Pa. St. 482; Maddox *v.* Brown, 71 Me. 432; Campbell *v.* Providence, 9 R. I. 262.

[2] Mitchell *v.* Crassweller, 13 C. B. 237; Stone *v.* Hills, 45 Conn. 44; Fiske *v.* Enders (Conn.), 47 Atl. 681; Storey *v.* Ashton, L. R. 4 Q. B. 476; Cousins *v.* Hannibal, &c. R., 66 Mo. 572.

[3] Joel *v.* Morison, 6 C. & P. 501; Sleath *v.* Wilson, 9 C. & P. 607; Patten *v.* Rea, 2 C. B. N. S. 606; Mulvehill *v.* Bates, 31 Minn. 364; Ritchie *v.* Waller, 63 Conn. 155.

[4] Quinn *v.* Power, 87 N. Y. 535.

[5] Ritchie *v.* Waller, 63 Conn. 155, 161.

against fire;[1] in the latter case it would seem that the negligence in not extinguishing it would be the negligence of the master.[2]

§ 245. (III.) The servant must be acting within the course of his employment.

Subject to the possible exceptions to be hereafter mentioned,[3] the master is liable for the torts of his servant only when the servant's act or omission is within the course of his employment.[4] The mere fact that the servant is in the employment of the master is, of course, never sufficient to charge the master with the consequences of the servant's misconduct.[5] It must further appear that the act or omission constituting the misconduct was expressly or impliedly within the scope or course of the servant's employment.[6]

This is essentially a question of fact, and the decision of it may rest upon any one or more of several considerations. First, the particular act may be expressly authorized by the master, in which case there would be no doubt that it is one of the ends to be accomplished by the employment.[7] Second, it may be ratified by the master, in which case it stands upon the same footing as an act previously authorized.[8] Third, it may be an act which the master reasonably led his servant to believe was authorized, although in fact the master never intended to authorize such an act, in which case the master is liable.[9] Fourth, it may be an act incidental to the duties actually prescribed or one which servants employed in a similar capacity usually have power to do, in which case it

[1] Morier *v.* St. Paul, &c. R., 31 Minn. 351.

[2] Chapman *v.* N. Y. Cent., &c. R., 33 N. Y. 369.

[3] See *post*, §§ 252–254.

[4] See *ante*, § 148 *et seq.*

[5] Aldrich *v.* Boston & Worcester R., 100 Mass. 31; Walton *v.* N. Y. &c. Co., 139 Mass. 556; Wiltse *v.* State Bridge Co., 63 Mich. 639.

[6] Burns *v.* Poulsom, L. R. 8 C. P. 563.

[7] Blackstone, Comm. I., 429–430; *post*, § 246.

[8] Dempsey *v.* Chambers, 154 Mass. 330; Nims *v.* Mt. Hermon School, 160 Mass. 177; *post*, § 247.

[9] May *v.* Bliss, 22 Vt. 477; Moir *v.* Hopkins, 16 Ill. 313; *post*, § 248.

will be presumed that the particular servant in question has been authorized to do it.[1] Fifth, it may be an act which the servant performs in the course of the business intrusted to him by the master and intended by the servant to be for the master's benefit, in which case it will be held to be within the scope of the employment, although the master never authorized or intended to authorize it.[2] Sixth, it may be an act not authorized or ratified, done by the servant while about the master's business but not intended for the master's benefit, in which case the master is not usually liable.[3] The last case put involves, however, further questions of considerable nicety which will be treated hereafter.[4]

Although the immediate cause of the injury may be the act of a servant who is outside the scope of his employment, a precedent and proximate cause may be the negligence of a servant who is within the scope of the employment. Thus where the master intrusts the driving of a van to A and the delivery of parcels from it to B with instructions that A is forbidden to leave the van and B is forbidden to drive it, and A does leave the van and B drives it and injuries a person, the master is liable, not for the negligence of B, for he is outside the scope of his employment, but for the negligence of A in leaving the van unattended.[5]

§ 246. — (1) Acts commanded by master.

If one commands another to commit a tort he becomes thereby a party to the tort and liable as a tort-feasor to the injured party.[6] This does not rest necessarily upon any relation of master or servant but upon the notion that the one directing

[1] West Jersey & Seashore R. *v.* Welsh, 62 N. J. L. 655; *post*, § 249.

[2] Burns *v.* Poulsom, L. R. 2 C. P. 563; Evans *v.* Davidson, 53 Md. 245; Palmeri *v.* Metropolitan Ry., 133 N. Y. 261; *post*, § 250.

[3] Bowler *v.* O'Connell, 162 Mass. 319; Mulligan *v.* New York, &c. Ry., 129 N. Y. 506; *post*, § 251.

[4] See *post*, §§ 252–254; *ante*, §§ 151–157.

[5] Engelhart *v.* Farrant, 1897, 1 Q. B. 240; Williams *v.* Koehler, 41 App. Div. (N. Y.) 426.

[6] Herring *v.* Hoppock, 15 N. Y. 409; Dyett *v.* Hyman, 129 N. Y. 351. For early cases on particular command, see 7 Harv. L. Rev. 384 *et seq.*

the wrong is a participant in it, and he and the servant may be sued jointly in trespass.[1] In such case it is not necessary that the specific act should be commanded; it is enough that the master has directed his servant generally to use force, or to commit a trespass, or to do any similar act under given circumstances, and that the servant in carrying out these instructions has committed the tort complained of.[2] Even where the master commands a lawful act but the servant by mistake does an unlawful one, the master may be held liable for the trespass.[3] The cases of an express command to do an unlawful act shade imperceptibly into the cases where the command is to conduct a certain business for the master and the question is whether the particular wrongful act is within the course of the employment.[4] Thus the acts of conductors or other trainmen in expelling trespassers from railway trains may be treated as the execution of a command or as the natural incident of the particular employment.[5]

If a master is liable in trespass for an unlawful assault or entry he is liable only for the natural consequences. Thus if he commands his servant to break and enter another's premises for a particular purpose, he is not liable if the servant steals personal property while there.[6]

§ 247. — (2) Acts ratified by master.

The doctrine of ratification has already been fully treated.[7] So far as concerns the ratification of torts it may be added that there is a question whether a merely personal tort, standing alone, can be ratified so as to make the one ratifying it a trespasser *ab initio*.[8] The question, however, does not usu-

[1] Hewett *v.* Swift, 3 Allen (Mass.), 420; Smith *v.* Webster, 23 Mich. 298; Ketcham *v.* Newman, 141 N. Y. 205.

[2] *Ibid.*; Barden *v.* Felch, 109 Mass. 154.

[3] Maier *v.* Randolph, 33 Kans. 340; May *v.* Bliss, 22 Vt. 477; Moir *v.* Hopkins, 16 Ill. 313.

[4] Wigmore, 7 Harv. L. Rev., p. 399 *et seq.*

[5] Rounds *v.* Delaware, &c. R., 64 N. Y. 129; Illinois Central R. *v.* Latham, 72 Miss. 32.

[6] Searle *v.* Parke, 68 N. H. 311.

[7] *Ante*, §§ 30–49.

[8] Adams *v.* Freeman, 9 Johns. (N. Y.) 117; Dempsey *v.* Chambers, 154 Mass. 330, 333.

ally come up in that form. It arises when a master wishing to take advantage of an unauthorized act of his servant, ratifies the act and accepts its benefits, and is then sought to be charged with some tort committed by the servant in the performance of it.[1] Thus a teamster without authority delivered for defendant a load of coal ordered by plaintiff, and in so doing broke plaintiff's plate-glass windows. Defendant ratified the act of delivery and it was held that he thereby became liable for the tort connected with it.[2] "The defendant's ratification of the employment established the relation of master and servant from the beginning with all its incidents, including the anomalous liability for his negligent acts." In other words, if the defendant had engaged the teamster to deliver the coal he would have been liable for the negligence connected with the employment: so, also, when he ratified the unauthorized act. To the same effect are other cases.[3]

If a servant commit an assault or other wrong while in the master's employment it is not a ratification of the tort merely to continue the servant in the employment.[4]

Acquiescence in the continuing negligent or wilful conduct of a servant may render the master liable, as acquiescence in a custom of workmen to throw off fire-wood from a construction train for their own private use,[5] or in a custom of cash-boys to snap pins for their amusement.[6]

§ 248. — (3) Acts which master reasonably led servant to believe were authorized.

The master may by his instructions lead a servant to believe that certain powers are intrusted to him. In such

[1] "Acceptance of benefits" by the principal or master is, at least, the best evidence of ratification, and may, historically, have been the origin of the doctrine. *Ante*, §§ 34, 121; 7 Harv. L. Rev. p. 387–388, *note*.

[2] Dempsey *v.* Chambers, 154 Mass. 330.

[3] Nims *v.* Mt. Hermon Boys' School, 160 Mass. 177; Lee *v.* Lord, 76 Wis. 582.

[4] Williams *v.* Pullman Palace Car Co., 40 La. An. 87; Gulf, &c. Ry. *v.* Kirkbride, 79 Tex. 457; Donivan *v.* Manhattan Ry., 1 Misc. (N. Y.) 368.

[5] Fletcher *v.* Baltimore & Potomac R., 168 U. S. 135.

[6] Swinarton *v.* Le Boutillier, 7 Misc. (N. Y.) 639, aff'd, 148 N. Y. 752.

a case, if this conclusion is one reasonably reached by the servant, the acts of the latter within the limits of the supposed authority will bind the master. Thus, if the master instructs the servant to go to a certain field and kill a beef, and the servant kills by mistake the animal of X, believing it to be the one meant by the master, the latter is liable for the trespass.[1] If the master tells the servant to take from a mill-yard such lumber as the mill-owner may point out as belonging to the master and the mill-owner points out lumber belonging to X and the servant takes it away, the master is liable.[2] If the master tells the servant to go and get X's team and the servant takes the team without X's consent and injures it, the master is liable.[3] In all of these cases the master intended something different from the result actually accomplished, but the servant acted upon the instructions as he reasonably understood them, and the master is bound by the act so performed within the scope of the employment and the instructions as understood. Although the master intended that his animal and not X's should be killed, that his lumber and not X's should be taken, and that X's team should be taken only with X's consent, yet if the servant reasonably believed that he was acting within his instructions, the master must bear the loss occasioned by the error.

§ 249. — (4) Acts impliedly authorized.

In addition to the acts expressly commanded or authorized, there are others which may fairly be implied as necessary or usually incidental to those actually authorized.[4] Frequently the whole problem of whether a given act is within the course or scope of the employment hinges upon this consideration.

[1] Maier *v.* Randolph, 33 Kans. 340.

[2] May *v.* Bliss, 22 Vt. 477.

[3] Moir *v.* Hopkins, 16 Ill. 313.

[4] Professor Wigmore has shown how, in the English law, the modern doctrine of "the course of the employment" grew out of the earlier doctrine of an implied command, 7 Harv. L. Rev. 383. "Whatever a servant is permitted to do in the usual course of his business is equivalent to a general command." Blackstone, Comm. I. 430.

Thus where a booking clerk of a railway company had caused the arrest of a person who he thought had been attempting to rob the till, the liability of the master was made to depend upon the answer to the inquiry whether the arrest was a necessary means of protecting the property committed to the servant's care.[1] So in a case where trainmen with excessive or improper force remove trespassers from the trains, the liability of the company rests upon the implied authority given to trainmen to protect the property under their care from such trespassers.[2] To some extent this authority may also be said to rest upon custom or usage.[3] In general, whatever are the customary powers of servants in like occupations or whatever powers are reasonably incidental to those actually conferred, will be inferentially the powers of the servant in question. Even an express grant of the particular power to another servant may not be sufficient to rebut the inference that such implied power is incidental to the occupation.[4]

The distinction between an express authority and an implied authority is clearly brought out in the cases dealing with the authority of railway trainmen to remove trespassers from their trains. It is usual for railway companies to confer upon conductors or other trainmen an express authority to remove trespassers, and when such authority is exercised there is no doubt whatever that the conductor is doing an act within the course of his employment.[5] If, however, a trespasser is removed by a brakeman there may be no such express authority, and the question arises whether there is an implied authority. If no express authority has been conferred upon a particular trainman then there is an implied authority for any trainman to remove the trespasser since the confiding of the care of the property to servants carries with it an implied authority to do any act reasonably necessary for its

[1] Allen *v.* London, &c. Ry., L. R. 6 Q. B. 65.
[2] West Jersey & Seashore R. *v.* Welsh, 62 N. J. L. 655.
[3] *Ibid.* Hoffman *v.* R. Co., 87 N. Y. 25.
[4] *Ibid.*
[5] Illinois Cent. R. *v.* King, 179 Ill. 91.

protection.[1] If express authority has been given to a particular trainman, as the conductor, will there still be an implied authority in other trainmen? It has been held that there will. "When the company committed to the conductor and his crew of brakemen the custody and care of its freight train, and thereby gave implied power to exclude and expel therefrom any unauthorized persons intruding thereon in contravention of the design and purpose of the company in running such a train, I think that the implication is not rebutted by proof that it had selected one of its servants and given him express authority in respect of such trespassers. The express grant is not inconsistent with the implied authority."[2] But if the express authority is given to one servant, and is expressly forbidden to all others, the opinion has been expressed that, as to trespassers at least, the presumption that the others had an implied authority would be rebutted.[3]

It is to be noted that these cases cannot proceed upon the doctrines of estoppel since no one is misled to his damage by the appearance of authority.[4] The primary question is whether the servant is acting in "the course of the employment," and in answering this it is proper to take account of any implied authority to act as he did.

§ 250. — (5) Acts for master's benefit.

A negligent act is not ordinarily intentional and the damage is inadvertent. Hence in negligence cases the inquiry rarely proceeds beyond the problem whether the act or omission was in the course of the employment. In wilful torts, however, the damage is advertent and the inquiry is directed to the additional point whether the act was intended for the master's benefit. If so intended by a servant in the course of his employment the master is liable.[5] It is conceivable that

[1] Hoffman *v.* N. Y. Cent., &c. R., 87 N. Y. 25. *Contra*, International, &c. Ry. *v.* Anderson, 82 Tex. 516; Chicago, &c. R. *v.* Brackman, 78 Ill. App. 141, and cases cited.

[2] West Jersey & Seashore R. *v.* Welsh, 62 N. J. L. 655, 663.

[3] Brevig *v.* Chicago, &c. R., 64 Minn. 168, 174–175.

[4] *Ante*, §§ 5, 52 *a*.

[5] *Post*, § 252.

a servant may intend to be negligent, that is he may know that he is not using the care proportioned to the circumstances, without intending to produce damage thereby. In such a case the inquiry may be proper whether the servant intended to further his master's, or his own, interests by such wilful departure from the standard of care.[1] It is clearly the law that all acts done by the servant in the course of the employment and in the furtherance of it, that is supposedly for the master's benefit, will, if they result in damage to third persons, render the master liable.[2]

§ 251. — (6) Acts for servant's benefit.

Where an act is clearly for the servant's benefit the negligent performance of it resulting in injury to a third person will not render the master liable, because, in such case, the servant is outside the course of the employment.[3] But where the act is so closely connected with the master's affairs that, though the servant may derive some benefit from it, it may fairly be regarded as within the course of the employment, the master will be liable.[4]

In case of wilful torts it is said that if the tort is not for the master's benefit, the master will not be liable,[5] but this is subject to exceptions and qualifications heretofore [6] and hereafter [7] noted.

§ 252. (IV.) Wilful or malicious torts: (1) in furtherance of the employment.

In the case of wilful or malicious torts it is easier to establish that the servant has departed from the course of his

[1] Philadelphia & Reading R. *v.* Derby, 14 How. (U. S.) 468; Weed *v.* Panama R., 17 N. Y. 362.

[2] Barwick *v.* English Joint Stock Bank, L. R. 2 Ex. 259; Evans *v.* Davidson, 53 Md. 245. *Post*, § 252. For cases on fraud and deceit see *ante*, §§ 151–157.

[3] Morier *v.* St. Paul, &c. R., 31 Minn. 351; *ante*, § 244.

[4] Quinn *v.* Power, 87 N. Y. 535; Ritchie *v.* Waller, 63 Conn. 155: *ante*, § 244.

[5] *Ante*, § 154.

[6] *Ante*, §§ 155–157.

[7] *Post*, §§ 252-254.

employment for ends of his own than in the case of merely negligent torts. Some early cases, indeed, lent color to the idea that the proof of wilfulness or malice would itself conclusively establish that the servant had quit sight of the object for which he was employed and entered upon some independent end suggested by his own malice.[1] Later cases have, however, overthrown this obviously incorrect notion and established the rule for wilful torts that the master is liable if such wilful acts are committed within the course of the employment and in furtherance of it.[2] It is noticeable that the cases establishing the general rule were those between passenger and carrier, but the rule now extends beyond this relation. In the case of wilful as well as negligent torts the test is, was the servant acting for his master and within the course of the employment?[3] In such cases there is usually an authority to do a certain thing, as to remove a trespasser, and the wrong consists in an excess of force or other improper method. Clearly in such cases the servant is acting for the master, and in the course of the employment, and the master is liable.

In New York the doctrine of *Wright* v. *Wilcox*[4] was followed down to and including *Isaacs* v. *Third Avenue Railroad Co.*,[5] but was soon after qualified in accordance with the modern rule. It is said in *Mott* v. *Consumers' Ice Co.*,[6] speaking of the language employed in the earlier cases, that "These intimations are subject to the material qualification, that the acts designated 'wilful,' are not done in the course of the service, and were not such as the servant intended and believed to be for the interest of the master." The general rule is said in that case to be, "that for the acts of the servant,

[1] M'Manus *v.* Crickett, 1 East, 106; Wright *v.* Wilcox, 19 Wend. (N. Y.) 343.

[2] Seymour *v.* Greenwood, 7 H. & N. 355; Limpus *v.* London General Omnibus Co., 1 H. & C. 526; Higgins *v.* Watervliet Turnpike Co., 46 N. Y. 23; Rounds *v.* Delaware, &c. R., 64 N. Y. 129; Hoffman *v.* N. Y. Cent., &c. R., 87 N. Y. 25; Howe *v.* Newmarch, 12 Allen (Mass.) 49.

[3] Rounds *v.* Delaware, &c. R., *supra.*

[4] 19 Wend. 343.

[5] 47 N. Y. 122.

[6] 73 N. Y. 543.

within the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business and the master's interest, the master will be responsible, whether the act be done negligently, wantonly, or even wilfully." And such is now the recognized rule in New York.[1]

A contract relation may strengthen the case as against the master. Thus, if the master is under contract to deliver pure milk and his servant out of malice adulterates it, the master is liable for the consequences.[2]

That the servant disobeyed the orders of the master is never a sufficient defence.[3] It must be shown further that he ceased to act for the master and in the course of the employment.[4] This is a question of fact and must frequently be submitted to the jury.[5]

Assault. If in removing a trespasser the servant uses an excess of force or puts the trespasser in unnecessary danger, the master is liable for all damages sustained provided the servant was acting within the course of the employment and in the furtherance of it.[6] But if the servant was exercising his implied authority for private ends of his own, as to extort money, then the master is not liable.[7] And if a brakeman accept a bribe to permit a trespasser to ride upon the train and afterward eject the trespasser, the latter will have no action against the railway company since he and the brakeman are joint trespassers.[8]

If a street-car driver wilfully and maliciously drives his car against a vehicle which is obstructing the track, it is a question of fact whether he does this in the course of the employ-

[1] Rounds *v.* Delaware, &c. R. *supra.*

[2] Stranahan *v.* Coit, 55 Oh. St. 398; *post,* § 253.

[3] Philadelphia, &c. R. *v.* Derby, 14 How. (U. S.) 468; Fitzsimmons *v.* Railway Co., 98 Mich. 257.

[4] Andrews *v.* Green, 62 N. H. 436.

[5] French *v.* Cresswell, 13 Ore. 418.

[6] Rounds *v.* Delaware, &c. R., 64 N. Y. 129.

[7] Illinois Central *v.* Latham, 72 Miss. 33.

[8] Brevig *v.* Chicago, &c. Ry., 64 Minn. 168. See also Keating *v.* R., 97 Mich. 154; Chicago, &c. R. *v.* West, 125 Ill. 320.

ment in order to get a clear track or whether he does it for private spite and malice.[1] So also where a janitor having charge of a room wilfully shoved a ladder upon which a workman was standing, it is a question of fact whether the janitor did this in order to facilitate his work for the master or out of personal spite and malice.[2] Some cases may be so clearly outside the scope of the employment that the court will not submit the question to a jury.[3] Others may be so clearly within the scope of the employment that the court will so decide. Between these extremes are all the doubtful cases in which the question is to be decided by the jury.[4]

It is not a bar to the plaintiff's recovery that he provoked the assault. The primary question is whether the servant was impelled by the purpose of furthering his master's affairs. If so the master is liable, although the provocation may be given in evidence in mitigation of damages.[5] If not, then the master is not ordinarily liable,[6] though the relation of carrier and passenger may vary the result.[7]

Arrest. Cases of unlawful arrest involve nice questions as to implied authority. If the arrest is supposedly in the master's interests and in the course of the employment, the master is liable,[8] but if in the interest of the public, then, although the occasion for the arrest may arise in the course of the employment, the master is not liable.[9] Thus, if a

[1] Cohen *v.* Dry Dock, &c. R., 69 N. Y. 170; Baltimore, &c. R. *v.* Pierce, 89 Md. 495.

[2] Nelson Business College Co. *v.* Lloyd, 60 Oh. St. 448.

[3] Johanson *v.* Pioneer Fuel Co., 72 Minn. 405; Rudgeair *v.* Reading Traction Co., 180 Pa. St. 333; Brown *v.* Boston Ice Co. (Mass.), 59 N. E. 644; Grimes *v.* Young, 51 N. Y. App. Div. 239.

[4] Dyer *v.* Munday, 1895, 1 Q. B. 742; Bergman *v.* Hendrickson, 106 Wis. 434.

[5] Bergman *v.* Hendrickson, *supra.*

[6] Scott *v.* Central Park, &c. R., 53 Hun (N. Y.), 414. But see Weber *v.* Brooklyn, &c. R., 47 App. Div. 306.

[7] *Post*, § 253.

[8] Palmeri *v.* Manhattan Ry., 133 N. Y. 261; Staples *v.* Schmid, 18 R. I. 224; Smith *v.* Munch, 65 Minn. 256.

[9] Mulligan *v.* N. Y. & R. B. Ry., 129 N. Y. 506; Abrahams *v.* Deakin, 1891, 1 Q. B. 516.

ticket-agent causes an arrest in order to secure good money in place of what he considers bad money, this is in the master's interest; but if he causes an arrest in consequence of a warning by the police, he is acting in the interest of the public.[1] The distinction seems to be that a servant may have an implied authority to protect his master's interests by causing the arrest of a person who is believed to be infringing them, but that he has no implied authority to seek to punish such a person after the attempt has ceased.[2] To lock in a passenger who refuses to pay his fare or give up his ticket is an act done for the master, and within the course of the employment.[3]

Whether a servant has any implied authority to cause an arrest must depend upon the nature of his duties. "The authority to arrest is only implied where the duties which an agent is employed to discharge could not be properly discharged without the power to arrest offenders promptly and on the spot."[4] It has been held that a clerk in a store has no such implied power to arrest and search a customer suspected of having stolen the employer's goods.[5] But this seems clearly incorrect in the light of subsequent decisions.[6]

In some jurisdictions it seems to be held that a servant must have express authority from the master to cause an arrest, or to set the criminal law in motion.[7]

Other wilful torts. A master is liable for libel,[8] malicious prosecution,[9] deceit,[10] infringement of patent,[11] or other wilful

[1] Mulligan *v.* N. Y. & R. B. Ry., 129 N. Y. 506; Abrahams *v.* Deakin, 1891, 1 Q. B. 516.

[2] Allen *v.* London & S. W. Ry., L. R. 6 Q. B. 65.

[3] Farry *v.* Great Northern Ry., 1898, 2 Ir. 352.

[4] Ashton *v.* Spiers, 9 Times Law Rep. 606.

[5] Mali *v.* Lord, 39 N. Y. 381.

[6] See criticism in Staples *v.* Schmid, 18 R. I. 224; Knowles *v.* Bullene, 71 Mo. App. 341; Fortune *v.* Trainor, 47 N. Y. St. Rep. 58; aff'd. 141 N. Y. 605; Mallach *v.* Ridley, 6 N. Y. St. Rep. 651; 15 Ib. 4.

[7] Turnpike Co. *v.* Green, 86 Md. 161.

[8] Andres *v.* Wells, 7 Johns. (N. Y.) 260; Bruce *v.* Reed, 104 Pa. St. 408

[9] Reed *v.* Home Savings Bank, 130 Mass. 443.

[10] *Ante*, §§ 151–157.

[11] Sykes *v.* Howarth, L. R. 12 Ch. Div. 826.

or malicious wrongs committed by the servant and within the course of the employment. It has sometimes been held that a master is liable for such torts only when expressly commanded or ratified,[1] and it was once thought that corporations could not be liable for torts involving wilfulness or malice;[2] but these notions have practically passed away with a better understanding of the true ground for such liability.[3]

§ 253. — (2) Wilful or malicious injuries to passengers.

A carrier is under a high degree of duty, voluntarily assumed, to passengers, and among these duties is the obligation to protect them from all misconduct on the part of its servants. The ordinary limits of liability for wilful and malicious acts do not bound this obligation. Whether the servant is acting for the master or for himself the master is liable for all wilful or malicious injuries inflicted by the servant upon the passenger.[4] Some cases fail to make this distinction between the liability of a master for the malicious torts of servants toward third persons generally and toward third persons to whom the master owes a special duty,[5] but the weight of authority is now decidedly in favor of such a distinction, and in New York the contrary decisions have been overruled.[6]

It is necessary in order that the doctrine be applicable that the relation of carrier and passenger should actually exist. It is often a nice question whether the relation has begun or has been terminated, but this lies outside the scope of this subject.[7] It

[1] Wallace *v.* Finberg, 46 Tex. 35.

[2] 5 Thompson on Corporations, § 6275 *et seq.*

[3] Philadelphia, &c. R. *v.* Quigley, 21 How. (U. S.) 202; Goodspeed *v.* East Haddam Bank, 22 Conn. 530.

[4] Stewart *v.* Brooklyn, &c. R., 90 N. Y. 588; Dwinelle *v.* N. Y. Cent. & H. R. R., 120 N. Y. 117; Craker *v.* Chicago, &c. R., 36 Wis. 657; Haver *v.* Central R., 62 N. J. L. 282.

[5] Allen *v.* Railway Co., L. R. 6 Q. B. 65; Isaacs *v.* R. Co., 47 N. Y. 122.

[6] Stewart *v.* R. Co., 90 N. Y. 588.

[7] See McGilvray *v.* West End Ry., 164 Mass. 122; Wise *v.* Ry. Co., 91 Ky. 537; Central Ry. *v.* Peacock, 69 Md. 257; Peeples *v.* Ry., 60 Ga. 281; Krantz *v.* R., 12 Utah, 104.

may continue even after the passenger has once left the premises if he afterwards returns for his baggage.[1]

This doctrine also has some application beyond the special relation of carrier and passenger in cases where by contract the master has voluntarily undertaken a particular duty toward a definite person, and has intrusted the discharge of the duty to a servant.[2]

That the liability of a carrier for wilful attacks upon passengers stands upon a different footing from the ordinary liability of a master for the torts of his servant is further illustrated by the fact that a carrier is liable to a passenger for the assault upon him by another passenger if, after due notice, the carrier does not take proper measures to protect the passenger so menaced or assaulted.[3]

If, however, a passenger provokes an assault by indecent and insulting language, it seems he may lose the high degree of protection involved in the relation of carrier and passenger, and, in such case, he can recover only if the servant was acting within the scope of the employment. Thus, if a passenger provokes a servant of the carrier to an assault outside the scope of the employment, the master is not liable.[4] But if one provokes a servant to an assault within the scope of the employment, the master is liable.[5]

§ 254.— (3) Misuse of dangerous instrumentalities.

If the master intrusts the care and use of an inherently dangerous instrumentality to a servant, he remains liable for any want of care on the part of the servant and also for any wanton, malicious, or mischievous use of the instrument by the servant.[6]

[1] Daniel *v.* R., 117 N. C. 592. *Cf.* Little Miami R. *v.* Wetmore, 19 Oh. St. 110.

[2] Stranahan, &c. Co. *v.* Coit, 55 Oh. St. 398.

[3] Flint *v.* Norwich, 34 Conn. 554; Lucy *v.* Ry., 64 Minn. 7; Putnam *v.* R. Co., 55 N. Y. 108; Meyer *v.* Ry., 54 Fed. R. 116; Pittsburg, &c Ry. *v.* Pillow, 76 Pa. St. 510; Chicago & Alton R. *v.* Pillsbury, 123 Ill. 9

[4] Scott *v.* Central Park, &c. R., 53 Hun (N. Y.) 414. But see Weber *v.* Brooklyn, &c. R., 47 N. Y. App. Div. 306.

[5] Bergman *v.* Hendrickson, 106 Wis. 434.

[6] Pittsburgh, &c. R. *v.* Shields, 47 Oh. St. 387.

The typical case is the misuse of torpedoes intrusted by a railway company to the care of trainmen. These are supplied for use in case of fog. If a trainman makes a use or misuse of them for his own ends, as to celebrate a public holiday or to have sport with timid persons, is the railway company liable for any damage suffered thereby by third persons? It has been held that it is liable, upon the ground that the servant having been intrusted with the safe keeping of the dangerous instrumentality, the master is liable for a want of care whether such want of care is due to negligence or wilfulness. The duty of the servant is not only to use the torpedoes when requisite, but to keep them safely when not in use. In taking them from the place where they are kept, and, in mere caprice, using them for his own ends, he violates the duty of safe keeping and renders the master liable.[1]

This doctrine has not met with universal approval, and other torpedo cases have been decided upon a strict application of the doctrine that the master is liable for a wilful or malicious act only when the servant does the act for the master in the course of the employment.[2]

If the torpedoes are taken by a servant, as a fireman, to whose care they are not confided, the master would not be liable.[3]

Another somewhat similar class of cases is that in which an engineer blows his whistle or lets off steam merely for the purpose of frightening horses, and not in the furtherance of any business or duty of the master. The almost universal opinion is that the master is liable under such circumstances. If the servant is engaged in operating the instrumentality intrusted to him and while so engaged wilfully perverts the agency to the purpose of wanton mischief, it is all the same as if he had produced the same result by negligence or inattention.[4]

[1] *Ibid.*

[2] Smith *v.* N. Y. Cent. & H. R. R., 78 Hun (N. Y.) 524.

[3] Chicago, &c. R. *v.* Epperson, 26 Ill. App. 72.

[4] Toledo, &c. Ry. *v.* Harmon, 47 Ill. 298; Chicago, &c. Ry. *v.* Dickson, 63 Ill. 151; Bittle *v.* Camden & Atl. R., 55 N. J. L. 615; Georgia R. *v.*

Where an engineer in order to frighten passengers on a street car started his engine suddenly and thereby caused a passenger to jump and injure herself, it has been held that the engineer was acting outside the scope of his duties and the company was not liable.[1] This conclusion is contrary to the cases cited above and appears to lose sight of the principles upon which those cases were decided. It has also been held that a hand-car is not dangerous enough to be brought within the rule.[2] If the servant is not authorized to run the locomotive, clearly his running it for ends of his own would be outside the scope of the employment.[3] A custom of non-authorized servants to use a locomotive, known to the master, may be equivalent to an authority.[4]

§ 255. Liability of master for exemplary damages.

A master is liable for exemplary damages for a tort of a servant which he either commands or ratifies if he would be liable for such damages in case he had personally committed the tort.[5]

If the master has not commanded or ratified such tort, but is held liable simply upon the doctrine that the servant has acted for him within the scope of the employment, there is a sharp conflict of authority. Many jurisdictions hold the master, whether a natural person or a corporation, not liable in punitive damages under such circumstances.[6] Other jurisdictions, while holding the same as to masters who are natural persons, hold that corporations are liable in

Newsome, 60 Ga. 492; Texas & P. Ry. *v.* Scoville, 62 Fed. R. 730; Cobb *v.* Columbia, &c. R., 37 S. C. 194; Skipper *v.* Clifton Mfg. Co. (S. Car.), 36 S. E. Rep. 509.

[1] Stephenson *v.* Southern Pac. Co., 93 Calif. 558.

[2] Branch *v.* International, &c. Ry., 92 Tex. 288.

[3] Cousins *v.* Hannibal & St. Jo. R., 66 Mo. 572.

[4] East St. Louis Connecting Ry. *v.* Reames, 173 Ill. 582.

[5] Denver, &c. R. *v.* Harris, 122 U. S. 597.

[6] Cleghorn *v.* N. Y. Cent. & H. R. R., 56 N. Y. 44; Haines *v.* Schultz, 50 N. J. L. 481; Craker *v.* Chicago, &c. R., 36 Wis. 657; Warner *v.* Southern Pac. R., 113 Calif. 105; Maisenbacker *v.* Society Concordia, 71 Conn. 369; Lake Shore, &c. R. *v.* Prentice, 147 U. S. 101.

punitive damages since corporations can act only through agents.[1]

§ 256. Imputed notice.

Knowledge of a servant concerning property committed to his care is the knowledge of the master. Hence, if the servant knows of the vicious tendencies of an animal of which he has charge this knowledge is imputed to the master.[2]

[1] Goddard *v.* Grand Trunk R., 57 Me. 202; Philadelphia, &c. R. *v.* Larkin, 47 Md. 155; Atlantic, &c. R. *v.* Dunn, 19 Oh. St. 162; *Ib.* 590; Citizens' Street R. *v.* Willoeby, 134 Ind. 563; Wheeler, &c. Co. *v.* Boyce, 36 Kans. 350.

[2] Brice *v.* Bauer, 108 N. Y. 428; Clowdis *v.* Fresno, &c. Co., 118 Calif. 315.

CHAPTER XXII.

LIABILITY OF PUBLIC AGENCIES OR PUBLIC CHARITIES FOR TORTS OF SERVANTS.

§ 257. General doctrine.

While a private person or corporation may be liable for the torts of servants, a public corporation, entity, person, or charity, is not ordinarily liable for the torts of officers or servants. This is placed on doctrines of public policy and expediency. It may be said, subject to qualifications to be hereafter noted, that the doctrine of *respondeat superior* does not apply, — (1) to the state or its agencies generally, (2) to municipalities so far as they are acting in a governmental capacity, (3) to public officers generally, (4) to public charities.

§ 258. Liability of the State and its agencies for torts of officers.

The Federal or State governments are not liable for the torts of their officers.[1]

Counties are not liable for the torts of their officers, unless such liability is fixed by positive law.[2] Even negligence in the construction of roads and bridges does not render a county liable according to the great weight of authority;[3] nor does negligence in the construction or maintenance of county buildings, as court houses and jails.[4] New England towns stand in this respect upon the same basis as counties,[5] as, indeed, do all such quasi-corporations as townships, school-districts, road-districts, and the like.[6] In many jurisdictions

[1] Mechem, Public Officers, §§ 848, 849.

[2] 7 Am. & Eng. Encyc. of Law (2d ed.), pp. 947–953.

[3] *Ibid*, p. 950; Markey *v.* County of Queens, 154 N. Y. 675, *contra* in Penn. and Md.

[4] *Ibid*, p. 949.

[5] Dillon, Munic. Corp., § 962.

[6] *Ibid*, § 963.

statutes expressly confer a remedy as against such quasi-corporations especially for injuries resulting from defective highways.[1]

§ 259. Liability of municipal corporation for torts of officers and servants.

Municipal corporations, or chartered cities, villages, or towns, stand upon a somewhat different basis. It is said that in the case of such corporations the persons comprising them are regarded as having voluntarily sought the powers conferred and must therefore be held to a higher degree of liability. Moreover such powers may include not only the usual public governmental powers, but also special powers or franchises, such as the power to supply gas, electric light, water, wharves, and the like. In the exercise of these latter powers the municipality is acting in much the same capacity as a private corporation engaged in the same business. Thus in *Hill* v. *Boston*,[2] it was held that the city was not liable for a defective stairway in a public school-house, and that in general a city is liable (in the absence of statute) only when the duty for breach of which the action is brought is a new one, and is such as is ordinarily performed by a trading company. This distinction would exclude municipal liability for defective highways, and the court in the case cited argues strongly for such a result, but the great weight of American authority is now to the effect that such a liability exists.[3]

It follows that municipal and quasi-municipal corporations, so far as they are acting in a governmental or discretionary character for public ends are not liable for the negligent or wilful wrongs committed by their agents or servants.[4] But where distinct duties are imposed upon them, purely ministerial and involving no exercise of discretion, the same liability attaches as in the case of private persons doing the

[1] *Ibid*, § 1000 and notes.

[2] 122 Mass. 344.

[3] Dillon, Munic. Corps. §§ 1017–1023; Conrad *v.* Ithaca, 16 N. Y. 158.

[4] City of Richmond *v.* Long's Adm'r, 17 Gratt. (Va.) 375; City of Anderson *v.* East, 117 Ind. 126; Hines *v.* Charlotte, 72 Mich. 278.

same duty.[1] Thus a city is not liable for the negligence of its officer in shooting at an unmuzzled dog,[2] nor for the negligent acts of members of its fire department,[3] or of any of the other of its agents or servants engaged in governmental or police duties.[4] A city is not rendered liable by the allegation or proof that it appointed an incompetent officer.[5] But it is liable for failure to keep its streets in proper repair,[6] or properly to plan and construct its public works.[7]

§ 260. Liability of public officer for torts of subordinates.

Public officers who act for the public generally, and not for private individuals who may have need of special service, are not liable for the torts of subordinates duly and properly selected. A subordinate is regarded, like the officer himself, as an agent of the public. Each is liable for his own torts, but one is not liable for the torts of the other.[8] A postmaster is not liable for the tort of a deputy or clerk, unless some personal negligence of his own be proved.[9] A collector of customs is not liable for the negligence of his subordinate.[10] An army or naval officer is not liable for the negligence, or other wrong, of an inferior officer,[11] unless he has participated in such wrongful act.[12]

[1] Seymour *v.* Cummins, 119 Ind. 148; Bates *v.* Westborough, 151 Mass. 174; Barron *v.* Detroit, 94 Mich. 601. But see Howard *v.* Worcester, 153 Mass. 426.

[2] Whitfield *v.* Paris, 84 Tex. 431; Culver *v.* Streator, 130 Ill. 238.

[3] Dodge *v.* Granger, 17 R. I. 664; Gillespie *v.* Lincoln, 35 Neb. 34.

[4] Robinson *v.* Rohr, 73 Wis. 436; O'Leary *v.* Marquette, 79 Mich. 281; Dillon, Munic. Corp. §§ 975–977.

[5] Craig *v.* Charleston, 180 Ill. 154; McIlhenny *v.* Wilmington, 127 N. C. 146.

[6] Conrad *v.* Ithaca, 16 N. Y. 158.

[7] Barron *v.* Detroit, 94 Mich. 601; Seymour *v.* Cummins, 119 Ind. 148.

[8] Lane *v.* Cotton, 1 Ld. Raym. 646; Governors, &c. *v.* Meredith, 4 T. R. 794.

[9] Dunlop *v.* Munroe, 7 Cranch, 242; Keenan *v.* Southworth, 110 Mass. 474; Hutchins *v.* Brackett, 22 N. H. 252; Conwell *v.* Voorhees, 13 Ohio, 523.

[10] Robertson *v.* Sichel, 127 U. S. 507.

[11] Nicholson *v.* Mouncey, 15 East, 384.

[12] Castle *v.* Duryee, 1 Abb. App. (N. Y.) 327.

In like manner a public trustee, as a school trustee, is not liable for the negligence of workmen or servants employed to make repairs upon a public building.[1] Nor is a receiver acting under the orders of the court liable for the torts of servants employed by him.[2]

Public officers who act for individuals, as sheriffs,[3] recorders of deeds,[4] clerks of courts,[5] and others whose acts are ministerial or administrative,[6] are liable to the individuals for whom they act for any negligence or other tort of a subordinate committed in the course of official transactions. This rule of liability is very frequently applied in the case of sheriffs.[7]

§ 261. Public charities.

Upon the question whether a public charitable corporation or trust is liable for the negligence or other torts of its agents and servants, there are these diverse holdings: —

(1) It is sometimes held that the trust funds contributed for charitable objects cannot be diverted to the payment of damages occasioned by the negligence or other torts of agents and servants.[8] Under this holding it could make no difference whether the one injured was a gratuitous recipient of the bounty, one who paid for the service, or an outsider. Nor could it make any difference whether the negligent person was one charged with the administration of the fund or a mere servant.

(2) The doctrine that the charitable funds cannot be reached in payment of damages for torts, has been doubted or repudi-

[1] Donovan *v.* McAlpin, 85 N. Y. 185; Wash *v.* Trustees, 96 N. Y. 427.

[2] Cardot *v.* Barney, 63 N. Y. 281.

[3] M'Intyre *v.* Trumbull, 7 Johns. (N. Y.) 35; Prosser *v.* Coots, 50 Mich. 262; State *v.* Moore, 19 Mo. 369.

[4] Russell *v.* Lawton, 14 Wis. 202.

[5] McNutt *v.* Livingston, 15 Miss. 641; Moore *v.* McKinney, 60 Iowa, 367.

[6] Wood *v.* Farnell, 50 Ala. 546.

[7] Mechem, Public Officers, § 798.

[8] Duncan *v.* Findlater, 6 Cl. & Fin. 894 (*dictum*); Feoffees of Heriot's Hospital *v.* Ross, 12 Cl. & Fin. 507; Fire Ins. Patrol *v.* Boyd, 120 Pa. St 624, also 113 Pa. St. 269; Downes *v.* Harper, 101 Mich. 555.

ated by other courts, but there has been no agreement as to the nature and extent of the liability of the charity.

(*a*) The general doctrine of *respondeat superior* has been applied and the charity held like any other master for the torts of servants.[1]

(*b*) The general doctrine of *respondeat superior* has been admitted, but it has been held that one accepting the services or bounty of the charity is a mere licensee and must take the service as he finds it, that is, "that there is no liability on the part of charitable corporations, arising out of the administration of the charity, to those who accept their bounty."[2] Under this doctrine there is a further divergence of opinion as to whether one who pays for the service is a recipient of the bounty. One case holds that he is, treating the payment as a mere contribution to the charity.[3] Other cases seem to regard the payment as imposing a special duty toward the payer for breach of which an action will lie.[4]

(*c*) The general doctrine of *respondeat superior* has not been admitted, and recovery is limited to those cases where it is shown that the administrators of the charity were themselves negligent in the appointment of incompetent servants or in the discharge of some other corporate or specially imposed duty.[5] The theory of this class of cases seems to be the one most generally acceptable, namely, that while a charitable corporation may be liable for negligence in the

[1] Glavin *v.* Rhode Island Hospital, 12 R. I. 411; Foreman *v.* Mayor, L. R. 6 Q. B. 214. See also Donaldson *v.* Commissioners, 30 New Bruns. 279

[2] Powers *v.* Mass. Homœopathic Hospital, 101 Fed. Rep. 896. And see Gooch *v.* Association, 109 Mass. 558.

[3] *Ibid.*

[4] Ward *v.* St. Vincent's Hospital, 39 N. Y. App. Div. 624; Richardson *v.* Carbon Hill Coal Co., 6 Wash. 52, S. C. 10 Wash. 648. See Glavin *v.* Rhode Island Hospital, *supra.*

[5] McDonald *v.* Massachusetts General Hospital, 120 Mass. 432; Union Pacific Ry. *v.* Artist, 60 Fed. Rep. 365; Joel *v.* Woman's Hospital, 89 Hun (N. Y.), 73; Van Tassell *v.* Manhattan Eye & Ear Hospital, 39 N. Y. St. Rep. 781, 15 N. Y. Supp. 620; Hearns *v.* Waterbury Hospital, 66 Conn. 98; Eighmy *v.* Union Pac. Ry., 93 Iowa, 538; Richardson *v.* Carbon Hill Coal Co., 10 Wash. 648.

performance of a corporate duty, the doctrine of *respondeat superior* is not applicable to it so as to render it liable for the torts of its servants.[1] This is merely an extension to charities of a doctrine elsewhere applied, that officers or trustees for public purposes are exempt from liability for torts of servants[2] but not for their own torts;[3] qualified by the further consideration that some duties are imposed upon public bodies in such a way that they cannot rid themselves of liability by putting the performance of the duty into hands of servants.[4] Under this view a charitable hospital, for example, has imposed upon it the duty to use due care to provide safe and suitable hospital appliances and skilled and competent physicians, surgeons, and nurses, and for a failure to fulfil this duty it would be liable to one injured thereby; but having fulfilled this duty, it is not liable for the negligence of such attendants or servants.[5] It is further to be noted that physicians and surgeons are not the servants of the hospital or other body that furnishes them and that in any event liability can attach only for negligently furnishing incompetent practitioners.[6]

Two classes of corporations or agencies must be distinguished. First, where a corporation or board of managers exercises governmental powers as an agent of the state or municipality, it falls under the head of public agencies already considered.[7] Second, private corporations organized for the protection of some interest of their supporters, as a "protective association" supported by insurance companies,

[1] See the very full and able discussion by Hamersley, J., in Hearns *v.* Waterbury Hospital, 66 Conn. 98.

[2] Holliday *v.* St. Leonard's, 11 C. B. N. S. 192.

[3] Mersey Docks *v.* Gibbs, L. R. 1 H. L. 93; Coe *v.* Wise, 5 B. & S. 440.

[4] Mersey Docks *v.* Gibbs, *supra*.

[5] Union Pacific Ry. *v.* Artist, 60 Fed. Rep. *supra;* Hearns *v.* Waterbury Hospital, *supra*.

[6] *Ante*, § 232.

[7] City of Richmond *v.* Long's Adm'r, 17 Gratt. (Va.) 375; Benton *v.* Trustees, 140 Mass. 13; Williamson *v.* Louisville Industrial School, 95 Ky. 251.

are not public charities merely because they incidentally render aid gratuitously to outsiders.[1]

§ 262. **Liability of private person served by public officer.** Any person may avail himself of the services of a public officer If he directs the doing of a lawful act he is not liable if the officer does an unlawful one or carries out the mandate by unlawful means.[2] In order to render the employer liable it is necessary to show that he either directed an unlawful act or subsequently ratified it;[3] in such cases the employer becomes a participant in the unlawful act.

Even where the statute requires the keepers of places of amusement who apply for a special police officer to pay his salary and "to be liable to parties aggrieved by any official misconduct of such police officer, to the same extent as for the torts of agents and servants in their employment," it is held that such an officer is not a servant and the person who applies for his appointment and pays his salary is not liable for his official misconduct in which such person does not participate.[4] But such officer, if in fact also a servant in and about the place, may act either as officer or as servant: if he acts as officer the employer is not liable on the doctrine of *respondeat superior*,[5] but if he acts as servant the employer may be liable on that doctrine.[6]

[1] Newcomb *v.* Boston Protective Department, 151 Mass. 215; (*Cf.* Fire Ins. Patrol *v.* Boyd, *supra*); Chapin *v.* Holyoke, &c. Assn., 165 Mass. 280. See also Wabash R. *v.* Kelley, 153 Ind. 119.

[2] Sutherland *v.* Ingalls, 63 Mich. 620.

[3] Hyde *v.* Cooper, 26 Vt. 552. See Mechem on Public Officers, §§ 904–907.

[4] Healey *v.* Lothrop, 171 Mass. 263.

[5] *Ibid.*

[6] Dickson *v.* Waldron, 135 Ind. 507.

CHAPTER XXIII.

LIABILITY OF MASTER FOR PENALTIES AND CRIMES.

§ 263. Introductory.

An agent or servant in the course of his master's business may do an act which is subject to a penalty or to punishment as a crime. Such an act may give rise to an action by a private person to recover a penalty, or to a criminal prosecution by the state. The problem in either case is whether the act of a servant in the conduct of the master's business and in the course of the employment, but not authorized or participated in by the master, will subject the latter to the penalty or to a conviction for crime.

§ 264. Liability to private penalties.

Penalties recoverable by private persons are usually the result of the commission of a statutory tort, that is a tort created and defined by statute and not by the common law. There seems to be no distinction between the liability of a constituent for the act of his representative amounting to a common-law tort and an act amounting to a statutory tort. In either case the test is whether the act was done by the agent or servant in the master's behalf and in the course of the employment.

The question arises frequently under the statutes giving a wife an action for a penalty, or for damages sustained, for the sale of intoxicating liquors to her husband. By these statutes, an act which might otherwise be lawful is made unlawful and is prohibited under penalty. A servant's breach of a statutory prohibition of this nature, committed while acting within the scope of his employment, renders the master liable in a civil action by the person aggrieved, for the

prescribed penalty. Thus, in a Massachusetts case,[1] it is said: "We see no reason why the general principle which governs the responsibility of the master for the acts of his servant should not apply in the case at bar. The action is brought under a statute which makes that a tort which was not so before, and provides for the recovery of damages against the tort-feasor. The tort consists in selling intoxicating liquor to one who has the habit of using it to excess, after notice of his habit and a request from his wife not to sell such liquor to him. The defendant engages in the business of selling liquor voluntarily. He chooses to intrust the details of the business to a servant. If he forbids the making of sales to the intemperate person, and his servant negligently, through forgetfulness of the instruction given him, or through a failure to recognize the person, continues to make sales to that person, there is no reason why the defendant should not be responsible for the wrongful act. The sale is his sale, made in the performance of his business, and is an act within the general scope of the servant's employment."

So also where statutes fix a penalty for the denial of equal civil rights to all persons, irrespective of color, a servant acting within the scope of his employment may render the master liable to the penalty, even though the master directs the servant to extend equal rights to colored persons.[2]

§ 265. Criminal liability generally.

The criminal liability of the principal is not governed by the same rules as his civil liability. The presumption of authority which arises from the relation of the parties and involves the principal in liability, is counter-balanced in the criminal law by the fundamental notion that every man is to be presumed innocent until he is proved guilty. From this presumption the conclusion is natural that a criminal act committed by the agent should be presumed to be committed contrary to, and not in obedience to, the directions of the

[1] George *v.* Gobey, 128 Mass. 289. See also Kreiter *v.* Nichols, 28 Mich. 496; Bodge *v.* Hughes, 53 N. H. 614.

[2] Bryan *v.* Adler, 97 Wis. 124.

principal. Something more than the mere fact that the agent was acting within the scope of his employment must therefore be shown in order to make the principal answerable in a criminal proceeding; it must ordinarily be shown that the crime was committed by the principal's direction and authority, or at least resulted from his negligence. "Criminal responsibility on the part of the principal for the act of his agent or servant in the course of his employment, implies some degree of moral guilt or delinquency, manifested either by direct participation in or assent to the act, or by want of proper care and oversight or other negligence in reference to the business which he has thus intrusted to another." [1]

The general rule is, therefore, that a master is not liable criminally for an offence committed by his servant.

To this general rule there seem to be several exceptions within somewhat ill-defined limits, notably in the case of the violation of revenue laws, licensing laws, health laws, and in the case of libel and nuisance.

The exceptions may be stated as follows: A master is liable criminally for the criminal act of his servant committed in the course of the employment, —

(1) if expressly or impliedly the statute defining the offence penalizes the proprietor of a business or of property in case the prohibited act is done in the conduct of his business or property without reference to his knowledge or assent;

(2) if he has authorized, assented to, or participated in the act;

(3) if by his negligent failure to exercise due control over the conduct of his business or property he has suffered the act to be done by a servant in the course of the employment.

§ 266. **Absolute liability.**

Where the statute defining an offence penalizes one whose business is carried on in a manner prohibited by the statute, it is immaterial whether the failure to comply with the statutory requirement is due to a personal default of the proprietor of the business, or to a default on the part of one to whom he has intrusted the conduct of the business. In either case the

[1] Comm. *v.* Morgan, 107 Mass. 199. See also Bishop, Crim. Law, Vol. 1. § 649.

proprietor is liable to the penalty. This may be illustrated by reference to licensing laws and health laws.

Licensing Laws. When the state grants a license to do that which without the license would be unlawful, it may impose a penalty for any violation of the conditions, whether by the licensee or by those to whom he intrusts the conduct of the business.[1] It is often a question of nice construction whether the law imposes an absolute liability to conduct the business in a particular way, or whether it renders the licensee liable only for an intentional violation.[2] If the former, then the master is liable for a violation by his servant, even though contrary to the will and the positive orders of the master;[3] if the latter, then the master is liable only if he knew of or countenanced the violation.[4] A sale by an agent or servant in the ordinary course of the employment, but contrary to law, makes a *prima facie* case against the master which the latter may rebut by proof that such sale was in good faith forbidden by him.[5]

Many cases have arisen in which a master is sought to be held criminally liable for some violation by his servant of the laws governing the sale of intoxicating liquors and the conduct of the premises where such sales are made. It is quite impossible to reconcile all of the cases under this head. The decision depends frequently upon a nice construction of the language of the statute.

If the statute, however, imposes an absolute duty upon the defendant, as the duty to keep his saloon closed at certain hours, or to place or remove screens at certain hours, then a violation of this duty will render the master liable to the penalty although the violation may be due to the wilful disobedience of a servant.[6]

[1] Collman *v.* Mills, 1897, 1 Q. B. 396.

[2] See cases discussed in Bond *v.* Evans, L. R. 21 Q. B. D. 249.

[3] Mullins *v.* Collins, L. R. 9 Q. B. 292; Bond *v.* Evans, L. R. 21 Q. B. D. 249.

[4] Kearley *v.* Tonge, 60 L. J. M. C. 159; Comm. *v.* Nichols, 10 Met. (Mass.) 259; Comm. *v.* Wachendorf, 141 Mass. 270.

[5] State *v.* McCance, 110 Mo. 398.

[6] People *v.* Roby, 52 Mich. 577; Comm. *v.* Kelley, 140 Mass. 441.

In some jurisdictions the statutes are so framed as to make a dealer liable for any violation of the liquor laws upon his premises, whether by his own act or by the act of a servant. In such case the dealer cannot escape liability by proving that the violation was contrary to his orders or will.[1]

Health Laws. Health laws to prevent the adulteration of foods, or the sale of one product under the guise of another, are very common. They provide variously for private penalties, public penalties, or indictment. The liability of a master for the violation of the law by his servant will frequently depend upon the form of the statute. In the case of *Rex v. Dixon*[2] the defendant was indicted for using alum in bread contrary to the statute and convicted upon proof that the alum was put in the bread by his foreman. Under a New York statute providing that the penalty for knowingly selling diluted or skimmed milk should be recoverable by the person to whom it was sold, it was held that in an action for the penalty, proof that the defendant's servants in the course of the employment, and in his behalf or interest, sold the skimmed milk, warrants the jury in finding that the act was authorized.[3] Under an act providing that one who knowingly sells oleomargarine, except in duly marked and stamped packages, shall be fined and imprisoned, it has been held that proof of an unlawful sale at defendant's place of business in the usual course of business by defendant's clerk is sufficient evidence of a violation to sustain a conviction.[4]

In many cases the question is whether on a fair construction of the law the master was intended to be made criminally liable for acts done by a servant within the scope of the employment but contrary to the orders and will of the master.[5]

[1] Noecker *v.* People, 91 Ill. 494; Carroll *v.* State, 63 Md. 551; McCutcheon *v.* People, 69 Ill. 601; Mullins *v.* Collins, L. R. 9 Q. B. 292; Bond *v.* Evans, L. R. 21 Q. B. D. 249.

[2] 3 M. & S. 11.

[3] Verona Central Cheese Co. *v.* Murtaugh, 50 N. Y. 314.

[4] Prather *v.* United States, 9 App. Cas. D. C. 82.

[5] Coppen *v.* Moore, 1898, 2 Q. B. 306.

§ 267. Authority.

If the act is done by the authority of the master he is a participant in it and punishable as such. It has been held, however, that a crime cannot be ratified.[1] Authority may be express or implied, and most of the confusion in the cases has been due to a difference in view, frequently unrecognized as such, as to the inference of authority to be drawn from the doing of the criminal act by the servant in the course of the employment.

It seems that proof of an illegal sale, whether it be a sale without a license, or a sale under a license but at forbidden hours or to forbidden persons, made by defendant's servant in charge of the defendant's place of business, may, if unexplained, warrant the jury in inferring that the sale was authorized.[2] But it is hardly correct to say that such proof raises a presumption of fact, and it may always be rebutted by proof that the sale was made without the master's knowledge, and in opposition to his will and purpose.[3]

If a liquor dealer in good faith instructs his clerks not to sell to minors but leaves them to judge of minority by the appearance of the customer, and one sells to a minor, believing him from appearance to be an adult, it is held that the master is not criminally liable, since there can be no doubt that there was no authority to sell.[4]

In the case of the violation of revenue laws, the action by the state is frequently in the nature of an action of debt to recover a penalty. If the act or omission giving rise to the proceeding has been the act or omission of a servant in the course of his employment the master may be liable to the penalty in the same way and for the same reason as in the case of torts committed by the servant. If the servant's act is commanded or ratified, the case is clear. If not commanded

[1] Morse *v.* State, 6 Conn. 9.

[2] Comm. *v.* Nichols, 10 Met. (Mass.) 259; Comm. *v.* Briant, 142 Mass. 463; Comm. *v.* Wachendorf, 141 Mass. 270.

[3] *Ibid.*; Anderson *v.* State, 22 Oh. St. 305; Comm. *v.* Stevens, 153 Mass. 421; State *v.* McCance, 110 Mo. 398.

[4] Comm. *v.* Stevens, 153 Mass. 421.

or ratified, there is still the usual question whether the act is done in behalf of the master and in the course of the employment.[1]

§ 268. Negligent failure to control.

The negligent failure to control duly his business activities may render the master liable criminally for the act of a servant.

Libel. Indictments for libel may stand upon this basis. If a libellous article is printed by or for the defendant, or sold at his shop, this is *prima facie* evidence of his guilt,[2] and he does not rebut this merely by showing that he did not know of the libel or authorize it.[3] It seems that in order to escape liability he must show that he did not know of or authorize the libel and that its publication was not due to any want of care or caution on his part in the conduct of his business.[4]

Nuisance. Indictments for nuisance, although criminal in form, may be in effect a kind of public action for tort. This is the case where the nuisance is injurious to the property rights of many but, being common, gives rise to no private action without proof of special damage. In such case the master is liable upon evidence which would support a civil action for damages. Thus the owner of a quarry is liable criminally for nuisance for the acts of his servants in casting rubbish into a public stream, in the course of the employment, although he may have forbidden them to do so.[5] The president and directors of a company may be convicted of a nuisance, although personally ignorant that it exists.[6]

[1] Attorney-General *v.* Siddon, 1 C. & J. 220; Attorney-General *v.* Riddle, 2 C. & J. 493.

[2] Rex *v.* Almon, 5 Burr. 2686; Clay *v.* People, 86 Ill. 147.

[3] Rex *v.* Gutch, Mood. & Malk. 433; Rex *v.* Walter, 3 Esp. 21. (But see for present English law, 6 & 7 Vict. c. 96, s. 7, and R. *v.* Holbrook, L. R. 3 Q. B. D. 60, 4 Q. B. D. 42.)

[4] Comm. *v.* Morgan, 107 Mass. 199; State *v.* Mason, 26 Ore. 273.

[5] Queen *v.* Stephens, L. R. 1 Q. B. 702.

[6] Rex *v.* Medley, 6 C. & P. 292.

PART III.

LIABILITY OF MASTER FOR INJURIES TO SERVANT.

§ 269. Introductory.

This part deals, — (1) with the liability of a master to one servant for an injury due to the act or omission of another servant, and (2) with the liability of a master to a servant for an injury due to an act or omission of the master himself. Under the first head are discussed the subjects of "fellow-servants" and "vice-principals"; under the second head the general duties of a master to his servant.

CHAPTER XXIV.

LIABILITY OF MASTER TO ONE SERVANT FOR TORTS OF ANOTHER SERVANT.

§ 270. Classification of servants.

For our present purpose we may divide all the servants of a common master engaged in a common service into two classes, namely, fellow-servants and vice-principals. In the first class are included all the servants engaged in purely operative acts, while in the second class are included all those to whom are delegated what, for want of a better term, we may call administrative acts.

It will be recalled that the distinction between an agent and a servant lies in the nature of the act to be performed. An agent is authorized to create new primary obligations; a servant is authorized to perform operative or ministerial acts not intended to create new primary obligations.[1] So also the distinction between a fellow-servant and a vice-principal lies in the nature of the act to be performed. If it be an operative act, the employee is a fellow-servant of all other employees; if it be an administrative act, the employee is a vice-principal in the sense that his act is the act of the master.

It will also be recalled that the distinction thus made between agents and servants leads to important legal consequences in fixing the liability of the employer.[2] So also the distinction here made between fellow-servants and vice-principals leads to important legal consequences in fixing the liability of a master to one servant for the tort of another.

It will also be recalled that the same employee may be both an agent and servant.[3] So also the same employee may be

[1] *Ante*, §§ 4–6. [2] *Ante*, § 5. [3] *Ante*, § 6.

both a fellow-servant and a vice-principal, for, since it is the nature of the act to be performed that determines the classification and its consequences, it is obvious that the same employee may perform at one moment an operative act and at another moment an administrative act.[1] A few courts, indeed, insist that an employee whose chief duties are administrative shall always be regarded as a vice-principal whatever act he may happen to perform,[2] but this is not in accord with the reason of the case or with the weight of authority.[3]

The term "vice-principal" is not in all respects happily chosen, since it carries with it a suggestion of the relation of principal and agent, but it is now firmly fixed and serves its purpose if correctly understood.

§ 271. The fellow-servant rule.

To the rule that a master is liable for the torts of his servant committed within the scope of the employment, there is one highly important exception, known as the "fellow-servant rule." This exception may be stated as follows: —

A master is not liable for personal injuries occasioned to one servant by the tort of a fellow-servant employed in the same common service, unless (1) the fellow-servant is acting as a deputy-master or vice-principal,[4] or (2) the master has negligently selected an incompetent fellow-servant, or negligently retained one,[5] or (3) by statute the master is made liable to one servant for the wrongful act or default of a fellow-servant.[6]

Various reasons have been given for this exception, the most generally accepted being that there is in every such contract of employment an implied term that the servant shall assume all the ordinary risks of the business, including the negligence of fellow-servants under the limitations indicated above.[7] But this is rather an attempted assimilation of

[1] *Post*, § 276. [2] *Post*, § 275. [3] *Post*, § 276.

[4] *Post*, § 274. For convenience and simplicity this is put in the form of an exception to the general rule.

[5] *Post*, § 278.

[6] *Post*, § 279.

[7] "When a man enters into the service of a master, he tacitly agrees

the exception to recognized legal conceptions than a reason or an explanation for the existence of the exception. *Why* such a tacit term should be read into every contract of employment remains unexplained except upon an antecedent theory that it is good general policy, serving useful social and industrial ends, that it should be so.[1] Whether such a theory is well founded it is now too late to inquire except in the consideration of remedial legislation. As a rule for the guidance of courts in the administration of justice the exception is firmly established and is universally applied, though not without important divergences in interpretation and in its application to particular sets of facts, as, for instance, in the meaning of "common service" and "deputy-master or vice-principal," and, in general, in the determination in special instances of who are and who are not "fellow-servants."

§ 272. Evolution of the rule.

The earliest case suggesting the fellow-servant rule is that of *Priestley* v. *Fowler*,[2] decided in 1837 in the English Court of Exchequer, but the question was not necessarily involved in the decision of that case. The earliest actual decision was in the case of *Murray* v. *South Carolina Railroad Company*,[3] handed down by the Court of Errors of South Carolina in 1841. The leading American case is that of *Farwell* v. *Boston and Worcester Railroad Company*[4] decided by the Supreme Judicial Court of Massachusetts in 1842 in an able opinion by Chief-Justice Shaw, and followed in the other jurisdictions.[5]

to take upon himself to bear all ordinary risks which are incident to his employment, and, amongst others, the possibility of injury happening to him from the negligent acts of his fellow-servants or fellow-workmen." Archibald, J., in Lovell *v.* Howell, 1 C. P. D. 161.

[1] Farwell *v.* Boston & Worcester R., 4 Met. (Mass.) 49.

[2] 3 M. & W. 1. Followed in Hutchinson *v.* York, 5 Exch. 343; Tarrant *v.* Webb, 18 C. B. 797; Morgan *v.* Vale of Neath R., L. R. 1 Q. B. 149, and subsequent cases. Adopted for Scotland, Bartonshill Coal Co. *v.* Reid, 3 Macq. H. L. 266.

[3] 1 McMull. Law, 385.

[4] 4 Met. 49.

[5] Brown *v.* Maxwell (1844), 6 Hill (N. Y.), 592; Coon *v.* Syracuse, &c. R. (1851), 6 Barb. 231, affirmed, 5 N. Y. 492; Ryan *v.* Cumberland

In the *Murray Case* the action was by a fireman for injuries sustained by the negligence of the engineer, and it was held by the majority of the court (seven to three) that it was not incident to the contract of employment that the company should guarantee him against the negligence of a co-servant, and that such negligence was one of the risks assumed by the plaintiff. In the *Farwell Case* the action was by an engineer for injuries occasioned by the negligence of a switchman, and it was held that "he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption, the compensation is adjusted accordingly; and we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment." It is argued that each servant is an observer of the conduct of the others and can give notice of any misconduct, incapacity, or neglect, and can leave the service in case the employer continues such incompetent servants. The argument that the servants were in different departments and therefore the rule of observing and influencing the conduct of each other ought not to apply, was dismissed as one likely to lead to great inconvenience in specific cases. Finally the whole matter is placed upon the doctrine that "the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand toward him in the relation of a stranger, but is one whose rights are regulated by contract express or implied."

In the leading New York case of *Coon* v. *The Syracuse and Utica Railroad*,[1] a track repairer was injured through the neg-

R., 23 Pa. St. 384; Mad River, &c. R. *v.* Barber, 5 Oh. St. 541; Honner *v.* Ill., &c. R., 15 Ill. 550; Madison R. *v.* Bacon, 6 Ind. 205; Sullivan *v.* Miss., &c. R., 11 Iowa, 421; Fraker *v.* St. Paul, &c. R., 32 Minn. 54; Cooper *v.* Milwaukee, &c. R., 23 Wis. 668.

[1] 5 N. Y. 492, affirming 6 Barb. 231.

ligence of trainmen, and it was held he could not recover, the court contenting itself with resting upon the authority of the English, South Carolina, and Massachusetts cases. Later New York cases accept the rule as unquestioned.[1]

In the leading Pennsylvania case of *Ryan* v. *Cumberland Valley Railroad Company*[2] a track laborer while riding to his work on a gravel train was injured by the negligence of the engineer or conductor, and it was held that he could not recover from the company. The court (two judges dissenting) follows the earlier cases, saying, "Where we find a road so well beaten, it is easy to follow it, and its beaten character is an indication that we may follow it with safety. The rule announced by these cases is, that where several persons are employed in the same general service, and one is injured from the carelessness of another, the employer is not responsible." The court then argues that the rule is one of convenience and necessary to the proper conduct of business enterprises.

The rule laid down in these leading cases has been adhered to in those jurisdictions and followed, with slight variations, in others. The English and Massachusetts cases were immediately discussed in Story on Agency,[3] and through this classic the fellow-servant doctrine was heralded to the profession at large and received general recognition from the courts.

Such variations of the rule as are found in a few states are rather the result of the shifting application of the rule than of any essentially different statement of it. Such are the "superior officer" doctrine of Ohio,[4] Nebraska,[5] and one or two other states;[6] and the "different department" doctrine of Illinois,[7] Missouri,[8] and some other states.[9]

[1] Russell *v.* Hudson Riv. R. Co., 17 N. Y. 134; Sherman *v.* Rochester, &c. R., 17 N. Y. 153; Wright *v.* New York Cent. R., 25 N. Y. 562; Crispin *v.* Babbitt, 81 N. Y. 516.

[2] 23 Pa. St. 384 (1854).

[3] 2d ed., 1843; 3d ed., 1846, §§ 453 *d*–453 *f*.

[4] Little Miami R. *v.* Stevens, 20 Ohio, 415.

[5] Union Pac. R. *v.* Doyle, 50 Neb. 555.

[6] Armstrong *v.* Oregon, &c. R., 8 Utah, 420; Richmond, &c. R. *v.* Williams, 86 Va. 165; Nix *v.* Texas, &c. R., 82 Tex. 473.

[7] Chicago, &c. R. *v.* Moranda, 93 Ill. 302.

[8] Dixon *v.* Chicago, &c. R., 109 Mo. 413.

[9] *Post*, § 273.

The rule is of comparatively modern origin, but its almost universal acceptance would seem to indicate that it rests on some substantial considerations of public policy that have constrained courts everywhere to follow it. It has been modified, however, in some jurisdictions by legislative action, of which more hereafter.[1]

§ 273. "Fellow-servants employed in the same common service."

In order that the rule should apply it is necessary that the servant injured and the servant at fault should be fellow-servants employed in the same service. They must have a common master, and for this reason it has been held that the employees of a palace-car company are not fellow-servants of the railroad company that hauls the palace car as a part of its passenger train.[2] This excludes from the category an independent contractor[3] and the servants of such contractor in their relation to the servants of the employer of the independent contractor[4] or to the servants of another independent contractor engaged by the same employer.[5] It also excludes, for another reason, compulsory servants, like pilots[6] and convicts,[7] since such servants not being free to contract cannot be said to have contracted to assume the risks of the negligence of those with whom they are compelled to work.

On the other hand there may be such a transfer of service for the time being as to render the general servant of A temporarily the servant of B and the fellow-servant of B's servants.[8]

So a volunteer assumes the same risks as a servant by contract, and becomes, therefore, while so volunteering, a fellow-servant of the regular servants of the person in whose

[1] *Post*, § 279.

[2] Jones *v.* St. Louis S. W. Ry., 125 Mo. 666; Hughson *v.* Richmond, &c. R. R., 2 D. C. App. Cas. 98.

[3] *Ante*, § 218 *et seq.*

[4] Murray *v.* Dwight, 161 N. Y. 301.

[5] Johnson *v.* Lindsay, 1891, A. C. 371.

[6] Smith *v.* Steele, L. R. 10 Q. B. 125. See *ante*, § 236.

[7] Buckalew *v.* Tennessee Coal Co., 112 Ala. 146. *Ante*, § 236.

[8] Ewan *v.* Lippincott, 47 N. J. L. 192. See *ante*, § 228 *et seq.*

interest he volunteers.[1] Perhaps the better doctrine is that the volunteer is not a servant at all, and assumes all the risks of the situation except that of wanton injury.[2]

The term fellow-servant also excludes such servants as, under the test to be applied in a particular jurisdiction, fall within the category of deputy-master or vice-principal.[3]

"Employed in the same common service" has a narrower meaning than "employed by the same master," since the same person may be engaged in two or more enterprises which have no essential relation to each other, or different departments of the same general business may be so dissociated as to be regarded as constituting different enterprises. An attempt has been made to refine upon this notion in such a way as to cut up the railroad business into different departments and exclude from the fellow-servant rule employees working in such different departments. This attempt has been successful in a few states,[4] but it is generally held that the railway employee assumes the risk of negligence in any department and that the whole business must be regarded as constituting one enterprise.[5] The general rule, outside of the states where the "different department" doctrine prevails, is that servants are engaged in the same common service whenever each might reasonably foresee, when engaging in the employment, that the negligence of the others is a risk to be encountered in the course of such service. This brings the test fairly within the reason of the fellow-servant rule, namely, that a servant undertakes the ordinary risks of the service including the negligence of other servants. The "different department" doctrine is a logical extension of another reason given for the fellow-servant rule, namely, that

[1] Osborne *v.* Knox, 68 Me. 49.

[2] Church *v.* Chicago, &c. R., 50 Minn. 218. *Ante*, § 240.

[3] *Post*, § 274.

[4] Chicago, &c. R. *v.* Moranda, 93 Ill. 302; Dixon *v.* Chicago, &c. R., 109 Mo. 413; Atchison, &c. R. *v.* McKee, 37 Kans. 592; Union Pac. R. *v.* Erickson, 41 Neb. 1; Armstrong *v.* Oregon, &c. R., 8 Utah, 420.

[5] Northern Pac. R. *v.* Hambly, 154 U. S. 349, and cases there cited; Wright *v.* New York Central R. Co., 25 N. Y. 562; Brodeur *v.* Valley Falls Co., 16 R. I. 448.

a servant is in a better position than the master to ascertain and guard against the negligence of those with whom he is employed: clearly this could apply only to those cases where he is, either generally or in a particular case, actually associated with the negligent servant in such a way as to be able to observe him and to exercise some influence over his conduct.[1]

Under the general rule a track repairer is the fellow-servant of a trainman,[2] while under the "different department" doctrine he is not.[3] Under the general rule a baggageman and an engineer are fellow-servants, while under the special rule they have been held not to be so, although both are employed upon the same train.[4]

It is everywhere admitted that two servants of the same master may be engaged in such totally different undertakings that neither can fairly be regarded as having assumed the risk of the negligence of the other. Thus where M is engaged in the ocean carrying trade, the seamen on one of his vessels are not to be regarded as the fellow-servants of the seamen on another of his vessels.[5] It is equally clear that under the general rule the trainmen on one railway train are the fellow-servants of the trainmen on another.[6] Between these extremes one might suggest the case of the servants on two ferry boats run by the same master and plying between the same points.

The driver of a wagon employed in a master's meat business is not in the same common service with a hod-carrier employed by the same master in the construction of a building intended for the extension of such meat business.[7]

Where one railway company runs its cars over the tracks of another, the employees of the latter are not fellow-servants of the employees of the former.[8] So an employee on a

[1] See Chicago, &c. R. *v.* Swan, 176 Ill. 424.
[2] Coon *v.* Syracuse, &c. R., 5 N. Y. 492.
[3] Chicago, &c. R. *v.* Moranda, 93 Ill. 302.
[4] Chicago, &c. R. *v.* Swan, 176 Ill. 424.
[5] The Petrel, 1893, P. 320.
[6] Oakes *v.* Mase, 165 U. S. 363.
[7] McTaggart *v.* Eastman's Co., 28 N. Y. Misc. 127.
[8] Smith *v.* New York, &c. R., 19 N. Y. 127; Murphy *v.* New York, &c. R., 118 N. Y. 527.

lighterer is not a fellow-servant of the seamen on a vessel employing the lighterer.[1] Generally in an action against a third person (not the master) the concurring negligence of a fellow-servant of the plaintiff will not bar a recovery.[2]

§ 274. First exception. — The vice-principal doctrine.

The rule then is that the master is not liable for personal injuries occasioned to one servant by the tort of a fellow-servant employed in the same common service. But the master is liable for his own negligence resulting in personal injuries to his servant.[3] He is also liable for the negligence of his deputy resulting in injuries to his servant. This deputy is known in the law as a vice-principal, and it now becomes necessary to ascertain who is, and who is not, a vice-principal.

At least two pretty well-defined tests have been applied for the solution of this problem: (1) that one is a vice-principal who has general superintendence and control of a business, or of some defined department of a business, and that a servant under his control and direction is not his fellow-servant[4]; (2) that one is a vice-principal who is engaged in performing for the master an administrative act which the law does not permit the latter to assign to any one, and that one so performing a non-assignable act is not the fellow-servant of any other employee.[5] It will be observed that the first test regards the rank and authority of the employee as decisive, while the second test regards the character of the act performed, and not rank or authority, as decisive. The first may be called the "superior officer test" and the second the "non-assignable duty test."

[1] Svenson *v.* A. M. S. Co., 57 N. Y. 108.

[2] Seaman *v.* Koehler, 122 N. Y. 646; Perry *v.* Lansing, 17 Hun (N.Y.), 34.

[3] *Post*, § 280 *et seq.*

[4] Little Miami R. Co. *v.* Stevens, 20 Ohio, 415; Union Pac. R. Co. *v.* Doyle, 50 Neb. 555; Moon *v.* Richmond, &c. R., 78 Va. 745.

[5] Crispin *v.* Babbitt, 81 N. Y. 516; New England R. Co. *v.* Conroy, 175 U. S. 323.

§ 275. Same. — The superior officer test.

The superior officer test seems to have had its origin in the case of *Little Miami Railroad* v. *Stevens*[1] decided by the Supreme Court of Ohio in 1851, and has been most fully worked out and explained by that court. As stated in a recent case the doctrine is that, "The implied obligation of the servant to assume all risks incident to the employment, including that of injury occasioned by the negligence of a fellow-servant, has no application where the servant by whose negligent conduct or act the injury is inflicted, sustains the relation of a superior in authority to the one receiving the injury. . . . Where one servant is placed by his employer in a position of subordination to, and subject to the orders and control of another, and such inferior servant, without fault, and while in the discharge of his duties, is injured by the negligence of the superior servant, the master is liable for such injury."[2] Nebraska also follows this doctrine.[3]

This rule, with some confusing variations, has been adopted in whole or in part in a few other states. In Illinois it is adopted to this extent, namely, that the master is liable to an inferior servant for the negligence of a superior servant, provided the superior is negligent in the exercise of the power over the inferior conferred upon him by the master. "If the negligence complained of consists of some act done or omitted by one having such authority, which relates to his duties as a co-laborer with those under his control, and which might just as readily have happened with one of them having no such authority, the common master will not be liable. . . . But when the negligent act complained of arises out of, and is the direct result of the exercise of, the authority conferred upon him by the master over his co-laborers, the master will be liable."[4] In Texas it is adopted subject to the additional qualification that the superior must have authority to hire

[1] 20 Ohio, 415.

[2] Berea Stone Co. *v.* Kraft, 31 Oh. St. 287, 291–292.

[3] Union Pac. R. *v.* Doyle, 50 Neb. 555.

[4] Chicago & Alton R. *v.* May, 108 Ill. 288; Meyer *v.* Ill. Cent. R., 177 Ill. 591.

and discharge the inferior.[1] In Kentucky the master is liable if the superior servant was "grossly" negligent, but not otherwise.[2] In several other states the Ohio rule is recognized to some extent.[3] The great weight of judicial authority is, however, opposed to this test.

By statutes in several jurisdictions the superior officer test is made a part of the positive law. Thus the "Employers' Liability Acts" make the master liable for the negligence of any person in the service who has any superintendence and while exercising such superintendence, or of any person in the service to whose orders or directions the workman at the time of the injury was bound to conform and did conform to his injury, or (beyond this test) of any person in the service who has charge or control of any signal, switch, locomotive engine, or train, etc., upon any railway.[4] In some states similiar acts exist applicable only to railroads.[5] In other states the fellow-servant rule is either totally abolished as to railroads or materially modified.[6]

§ 276. Same. — The non-assignable duty test.

Most of the American jurisdictions recognize and apply the "non-assignable duty" test in determining who is or who is not a vice-principal. This test has its foundation in the con-

[1] Missouri Pac. R. *v.* Williams, 75 Tex. 4; Nix *v.* Texas, &c. R., 82 Tex. 473.

[2] Louisville, &c. R. *v.* Collins, 2 Duv. 114; Greer *v.* Louisville, &c. R., 94 Ky. 169.

[3] Moor *v.* Railroad, 85 Mo. 588; Russ *v.* Wabash W. Ry., 112 Mo. 45; Mason *v.* Richmond, &c. R., 111 N. C. 452, s. c. 114 N. C. 718; Railroad *v.* Spence, 93 Tenn. 173; Electric Ry. *v.* Lawson, 101 Tenn. 406, Andreson *v.* Ogden, &c. Co., 8 Utah, 128; Armstrong *v.* Railway Co., 8 Utah, 420.

[4] 43 & 44 Vict. c. 42; Alabama Code, §§ 2590-2592; Colorado L., 1893, c. 77; Indiana Acts, 1893, c. 130; Massachusetts Acts, 1894, c. 499. See Utah L., 1896, c. 24. *Post*, § 279.

[5] Arkansas Statutes, §§ 6248-6250; Mississippi Const., § 193; Ohio L. 1890, p. 149. *Post*, § 279.

[6] Florida L. of 1891, c. 4071; Georgia Code, § 3036; Iowa Code, § 1307; Kansas L. 1874, c. 93; Wisconsin L. of 1893, c. 220. *Post*, § 279.

ception that a master owes to his servants certain duties for the proper performance of which he remains always liable irrespective of whether he performs them in person [1] or through representatives; or, to put it in another way, the servant does not assume the risk of the due performance of these duties even though he is aware that they are to be performed by a co-servant. In order to grasp this test it is necessary first to enumerate the duties which the master owes to his servants and for the due performance of which he remains always liable.

A master is bound to use due care, either personally or through a vice-principal, to provide and maintain: —

(1) A sufficient number of competent servants; [2]

(2) Suitable instrumentalities, including a safe place to work and safe tools and appliances; [3]

(3) Suitable inspection of such instrumentalities; [4]

(4) Suitable general rules and regulations for the government of the service; [5]

(5) Suitable special orders necessary to the safety of the service; [6]

(6) Suitable warning of any unusual or extraordinary risk; [7]

(7) Suitable supervision necessary to meet the above requirements.[8]

Any servant, whatever his grade or rank, to whom the master delegates the performance of any of the above duties is a vice-principal while engaged in such performance, al-

[1] See *post*, § 282.

[2] Flike *v.* Boston & A. R., 53 N. Y. 549; Coppins *v* New York Cent. &c. R., 122 N. Y. 557; Wabash Ry. *v.* McDaniels, 107 U. S. 454.

[3] Fuller *v.* Jewett, 80 N. Y. 46; Ford *v.* Fitchburg R., 110 Mass. 240.

[4] Bailey *v.* Rome, &c. R., 139 N. Y. 302; Nord Deutscher, &c. Co. *v.* Ingebregsten, 57 N. J. L. 400. *Cf.* Cregan *v.* Marston, 126 N. Y. 568.

[5] Abel *v.* Delaware & H. C. Co., 103 N. Y. 581; *Ibid.* 128 N. Y. 662.

[6] Hankins *v.* New York, &c. R., 142 N. Y. 416.

[7] Mather *v.* Rillston, 156 U. S. 391; Fox *v.* Peninsular Lead Works, 84 Mich. 676; Smith *v.* Oxford Iron Co., 42 N. J. L. 467.

[8] Whittaker *v.* D. & H. C. Co., 126 N. Y. 544; Wabash Ry. *v* McDaniels, 107 U. S. 454.

though as to his other duties he may be a fellow-servant.[1] Any servant, whatever his grade or rank, who is engaged in an operative act, as distinguished from one of the above preparative or regulative acts, is a fellow-servant and not a vice-principal, although as to his duties generally he may be a vice-principal.[2] In other words, the nature of the act, and not the grade or rank of the actor, constitutes the test. The situation is much the same as if the statutes prescribed that every employer should observe the above requirements, in which case it would be no answer that the neglect to do so was the neglect of the fellow-servant of the plaintiff.[3]

The leading case is *Crispin* v. *Babbitt*[4] where it appears that a general superintendent or head man of defendant's iron works negligently let on steam and started a wheel on which plaintiff was at work. It was held that this was an operative act and not the performance of any non-assignable duty, and that the superintendent was, therefore, in the doing of that act, the fellow-servant of the plaintiff. "The liability of the master does not depend upon the grade or rank of the employee whose negligence causes the injury. A superintendent of a factory, although having power to employ men, or represent the master in other respects, is, in the management of the machinery, a fellow-servant of the other operatives. On the same principle, however low the grade or rank of the employee, the master is liable for injuries caused by him to another servant, if they result from the omission of some duty of the master, which he has confided to such inferior employee." The rule thus laid down has been accepted by the United States Supreme Court,[5] and by the courts of upwards of thirty states.[6]

It will be observed that the rule has two aspects in its

[1] Northern Pac. R. *v.* Herbert, 116 U. S. 642; cases cited *supra.*

[2] Crispin *v.* Babbitt, 81 N. Y. 516.

[3] New York, &c. R. *v.* Lambright, 5 Oh. Cir. Ct. R. 433.

[4] 81 N. Y. 516.

[5] Central R. *v.* Keegan, 160 U. S. 259; New England R. *v.* Conroy, 175 U. S. 323, overruling Chicago, &c. R. *v.* Ross, 112 U. S. 377.

[6] See 1 Sh. & Red. on Neg., § 232; 12 Am. & Eng. Ency. of Law (2d ed.), pp. 948–970.

application to concrete facts: (1) An employee whose duties are mainly those of a vice-principal may by the doing of an operative act become a fellow-servant;[1] (2) An employee whose duties are mainly operative may by being intrusted with the performance of a non-assignable duty become a vice-principal.[2] It follows that the same servant may occupy a dual position, and be at one moment, in the performance of one act, a vice-principal, and the next moment, in the performance of another act, a fellow-servant. The superior officer test is antagonistic to the first aspect of the non-assignable duty test, but not to the second. A superior officer is in Ohio a vice-principal, even though performing an operative act.[3] But an operative might, conceivably, become a vice-principal also if performing a non-assignable duty.[4] In other words the second aspect of the non-assignable duty test may be united to the superior officer test (as it is in Illinois)[5] and thus make the most liberal common law rule in favor of the servant.

Certain employees are, as to their ordinary duties, vice-principals, and a default upon their part as to those duties is a default of the master. A president of a corporation,[6] a superintendent,[7] a train despatcher,[8] or a regular car inspector,[9] and other superior officers charged with administrative duties, are as to such duties vice-principals; but if they temporarily perform operative acts they are fellow-servants.[10] On the other hand conductors of railway trains,[11] engineers,[12] and

[1] Donnelly *v.* San Francisco Bridge Co., 117 Cal. 417; Crispin *v.* Babbitt, 81 N. Y. 516.

[2] Nixon *v.* Selby, &c. Co., 102 Cal. 458.

[3] Berea Stone Co. *v.* Kraft, 31 Oh. St. 287.

[4] Mobile, &c. R. *v.* Godfrey, 155 Ill. 78, a jurisdiction that also holds to the superior officer test (Chicago & A. R. *v.* May, 108 Ill. 288).

[5] *Ibid.*

[6] Smith *v.* Iron Co., 42 N. J. L. 467.

[7] Chapman *v.* Erie Co., 55 N. Y. 579; Sheehan *v.* R. Co., 91 N. Y. 332; Johnson *v.* Nat. Bank, 79 Wis. 414.

[8] Hankins *v.* R. Co., 142 N. Y. 416; Hunn *v.* Michigan, &c. R., 78 Mich. 513; Felton *v.* Harbeson, 104 Fed. Rep. 737.

[9] Eaton *v.* New York Cent., &c. R., 163 N. Y. 391.

[10] Crispin *v.* Babbitt, 81 N. Y. 516.

[11] Slater *v.* Jewett, 85 N. Y. 61.

[12] Harvey *v.* R. Co., 88 N. Y. 481; Capper *v.* R. Co., 103 Ind. 305.

trainmen generally,[1] are as to their ordinary duties fellow-servants of other employees engaged in operative acts.

§ 277. Same. — Summary of vice-principal doctrines.

A master remains liable to his servant for the negligence of a vice-principal. To determine who is a vice-principal there are two tests. But these are not in their entirety antagonistic, and there may therefore be a combination of the one with a part of the other. This leads to these possible results:

(1) The rank of the negligent servant is the sole test. If the negligent employee is a superior officer of the injured employee, the master is liable irrespective of the character of the act.[2] If the negligent servant is not a superior officer of the injured servant, the master is not liable whatever the character of the act.[3]

(2) The character of the act is the sole test. If the superior officer performs an operative act he is a fellow-servant.[4] If an inferior servant performs a non-assignable duty, he is a vice-principal.[5]

(3) The rank of the negligent servant is a sufficient test in case the negligent servant is the superior of the injured servant.[6] In other cases the character of the act is the proper test.[7]

It is doubtful whether, even in Ohio, the first result would be accepted in its logical entirety. In the greater number of jurisdictions the second result seems to be accepted, while in a few the combination indicated in the third is accepted.

§ 278. Second exception. — Incompetent fellow-servants.

If the master negligently selects incompetent servants or negligently retains them, he is liable to a fellow-servant injured

[1] Roberts *v.* R. Co., 33 Minn. 218; Ewald *v.* R. Co., 70 Wis. 420.

[2] Berea Stone Co. *v.* Kraft, 31 Oh. St. 287.

[3] Railroad Co. *v.* Fitzpatrick, 42 Oh. St. 318; Coal & Mining Co. *v.* Clay, 51 Oh. St. 542, 559 (*semble*).

[4] Crispin *v.* Babbitt, 81 N. Y. 516.

[5] Fuller *v.* Jewett, 80 N. Y. 46.

[6] Chicago & A. R. *v.* May, 108 Ill. 288.

[7] Mobile, &c. R. *v.* Godfrey, 155 Ill. 78.

through the negligence of such incompetents.[1] To furnish safe servants is one of the master's duties, like the furnishing of safe instrumentalities, and he must use due care to perform it. "Incompetency exists, not alone in physical or mental attributes, but in the disposition with which a servant performs his duties. If he habitually neglects these duties, he becomes unreliable, and although he may be physically and mentally able to do well all that is required of him, his disposition toward his work and toward the general safety of the work of his employer and to his fellow-servants, makes him an incompetent man."[2] The master must be wanting in due care, that is, he must be negligent in hiring or negligent in retaining the servant after notice, or reasonable means of notice, of such incompetency.[3] A single negligent act of a servant is not sufficient evidence of incompetence.[4] But evidence of the servant's reputation for intemperance or other disability is competent.[5] The question is one of fact.[6]

§ 279. Third exception. — Statutory provisions.

The liability of a master to one servant for the negligence of another has been much enlarged by statute. These statutes are sometimes general in their nature, and sometimes made applicable only to railroad corporations.

Employers' Liability Acts. The first of these acts is the English Employers' Liability Act passed in 1880.[7] This act provides:

(1) When personal injury is caused to a workman[8] by

[1] Coppins *v.* New York Cent., &c. R., 122 N. Y. 557.

[2] *Ibid.*, p. 564.

[3] Cameron *v.* New York Cent., &c. R., 145 N. Y. 400.

[4] Baulec *v.* N. Y., &c. R., 59 N. Y. 356; Evansville R. *v.* Guyton, 115 Ind. 450.

[5] Chicago & A. R. *v.* Sullivan, 63 Ill. 293; Hilts *v.* Chicago, &c. R., 55 Mich. 437.

[6] Mann *v.* Delaware & H. C. Co., 91 N. Y. 495; Sutherland *v.* Troy, &c. R., 125 N. Y. 737; Wall *v.* Delaware, &c. R., 54 Hun, 454, affirmed, 125 N. Y. 727.

[7] 43 & 44 Vict. c. 42.

[8] As defined by Employers and Workmen Act, 1875, *i. e.* railway ser

reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, which defect arose from or had not been discovered or remedied owing to the negligence of the employer or of some person in the service of the employer and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition, — the workman shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work,[1] unless the workman knew of the defect or negligence which caused the injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or neglect.[2]

(2) Where personal injury is caused to a workman by reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him[3] whilst in the exercise of such superintendence, — the workman shall have, etc. [same as in section 1].

(3) Where personal injury is caused to a workman by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed, — the workman shall have, etc. [same as in section 1].

vants, manual laborers, etc., not including seamen or domestic servants. Sec. 8 of the Act.

[1] This somewhat infelicitous clause is interpreted to mean, — the doctrine of the implied assumption by the workmen of these risks, including the negligence of a fellow-servant, shall not apply. Griffiths *v.* Earl of Dudley, 9 Q. B. Div. 365.

[2] This clause retains the doctrine of contributory negligence and the assumption of risk known to the servant but unknown to the master. The whole of this section is probably law in most of the United States under the non-assignable duty test.

[3] Means a person whose sole or principal duty is that of superintendence and who is not ordinarily engaged in manual labor. Sec. 8 of the Act.

(4) Where personal injury is caused to a workman by reason of the act or omission of any person in the service of the employer done or made in obedience to rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf, and the injury resulted from some impropriety or defect in the rules, by-laws, or instructions, — the workman shall have, etc. [same as in section 1].

(5) Where personal injury is caused to a workman by reason of the negligence of any person in the service of the employer who has the charge and control of any signal points, locomotive engine or train upon a railway, — the workman shall have, etc. [same as in section 1].[1]

The action must be brought within six months, or in case of death, within one year from the time of death,[2] and notice of the injury must be given within six weeks. The amount recoverable shall not exceed the equivalent of the estimated earnings during three years preceding the injury of a person in the same grade, in like employment, and in the district in which the workman is employed at the time of the injury.[3]

The terms of this act with some local variations have been adopted by statute in Alabama (Code, §§ 2590–2592), Colorado (L. 1893, c. 77), Indiana (Acts of 1893, c. 130), and Massachusetts (Acts of 1887, c. 270, amended by Acts of 1894, c. 499).[4] Mississippi (L. 1896, c. 87) adopts substantially the provisions of section 2.

Railroad Employers' Liability Acts. In the above acts a special liability is fixed upon railroad employers by section 5. Some states have passed acts fixing such a liability without

[1] In some of the states the list includes switch, car, or any part of the track of a railway. See Alabama Code, § 2590–2592. Indiana adds telegraph office, switchyard, shop, round-house, Acts of 1893, c. 130.

[2] In Massachusetts one year ; in Colorado, two years. In Alabama and Indiana governed by general statute of limitations.

[3] In Massachusetts $4000 or $5000 is the limit according to prescribed circumstances. The other statutes leave the matter in the same situation as to damages as in an action at common law.

[4] For a discussion of these acts see Reno, Employers' Liability Acts For the Mass. Act, see Appendix, *post*.

enlarging the liability of other employers. The earliest of these acts antedating the English act was passed in Georgia in 1855.[1] It provides: —

"If the person injured is himself an employee of the [railroad] company, and the damage was caused by another employee, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to his recovery."

Florida has an enactment in almost similar terms.[2] Kansas has one in more general terms, but to similar effect.[3] So also Missouri.[4] Iowa has one limited to injuries occasioned by the use and operation of the railroad.[5] Texas has one similarly limited.[6] Wisconsin has one covering defects in instrumentalities and negligence of fellow-servants.[7]

Other states have statutes making the railroad liable to an inferior servant for any injury due to the negligence of a superior, or of a person having control and direction of the injured servant.[8]

Whether the servant may by special contract deprive himself of the benefit of these statutes is a disputed question. At common law it has generally been held that a contract made in advance whereby an employee agrees to release and discharge his employer for any injury that may be received by reason of the negligence of the employer, or of his servants, is contrary to public policy and void.[9] In Georgia, however, such a contract is held valid.[10]

[1] Code, § 2323 (3036).
[2] L. 1891, c. 4071.
[3] L. 1874, c. 93.
[4] Rev. St., § 2873.
[5] Code, 1897, § 2071.
[6] L. 1897, Sp. Sess., c. 6.
[7] L. 1893, c. 220; Statutes 1898, § 1816.

[8] Arkansas St., § 6248; Mississippi Const., § 193, and Code, § 3559; Missouri Rev. St., § 2874; Montana Civil Code, § 905; Ohio L. 1890, p. 149; Texas Rev. St., § 4560 *f*; Utah Rev. St., § 1342.

[9] Reno, Employers' Liability Acts, § 8; Ry. Co. *v.* Spangler, 44 Oh. St. 471; Little Rock, &c. Ry. *v.* Eubanks, 48 Ark. 460; Johnson *v.* Richmond, &c. Ry., 86 Va. 975; 2 Thompson on Neg., 1025; Roesner *v.* Hermann, 8 Fed. Rep. 782; Louisville, &c. R. Co. *v.* Orr, 91 Ala. 548.

[10] Western, &c. Ry. *v.* Bishop, 50 Ga. 465; Fulton Mills *v.* Wilson, 89 Ga. 318. In New York the precise question has not risen for decision, and the Court of Appeals has carefully refrained from expressing its

By statute, under the Employers' Liability Acts, the question presents itself under two aspects. First, in some jurisdictions the statute does not in express terms forbid the making of such contracts. This is the case under the English and Alabama statutes, but diametrically opposite results have been reached by the courts in those jurisdictions. In England it has been held that it is not contrary to the policy of the statute to allow an employee to waive the benefit of the act by contract, and that such a contract is binding not only upon the employee himself, but also upon his representatives.[1] In Alabama, it has been held that such a contract is void as contrary to public policy.[2] Second, in some states the statute expressly forbids the making of such contracts. This is the case under the statutes in Indiana,[3] Iowa,[4] Massachusetts,[5] Minnesota,[6] Mississippi,[7] Texas,[8] Wisconsin,[9] and Wyoming.[10]

That part of the Ohio statute making this restriction[11] has been held unconstitutional.[12]

opinion on the question in cases where it might have done so. Purdy *v.* Rome, &c. Railroad Company, 125 N. Y. 209.

[1] Griffiths *v.* Dudley, 9 Q. B. D. 357. Reno, Employers' Liability Acts, § 6.

[2] Hissong *v.* Richmond, &c. Ry., 91 Ala. 514.

[3] Laws of 1893, ch. 130, § 5.

[4] Code, § 1307.

[5] St. 1894, ch. 508, § 6.

[6] Laws of 1887, ch. 13.

[7] Constitution (1890), § 193.

[8] Laws of 1891, ch. 24, § 2.

[9] Laws of 1893, ch. 220.

[10] Laws of 1890–91, ch. 28.

[11] St. of Apr. 2, 1890 (Ohio Laws, vol. 87, p. 149).

[12] Shaver *v.* Penn. Co., 71 Fed. 931.

CHAPTER XXV.

LIABILITY OF MASTER TO SERVANTS FOR HIS OWN TORTS.

§ 280. Introductory.

The liability of a master to his servants for torts may be due to his own personal act or omission, or to the act or omission of his representative. We have discussed the latter situation and have seen within what limits the master is liable to one servant for the torts of another. It now remains to discuss the liability of the master for his own personal torts resulting in damages to his servant. These torts may be either negligent or wilful. If negligent, they may be either operative acts or omissions, or acts or omissions connected with the performance of one of the non-assignable duties heretofore enumerated.

§ 281. Negligent operative act.

If the master is working with his servants in operating the machinery of the service, he is liable for any injury to them arising from his negligence. He is not a fellow-servant when so engaged. Any representative of his, however high in rank, may become a fellow-servant if engaged in an operative act,[1] but not so the master himself. It is no part of the implied contract of a servant to assume any risk as to the master's negligence under any circumstances. It follows that a servant may recover for any injury due to the master's personal negligence.[2] If the master is a partnership, the negligence of one partner is the negligence of all.[3] If the master's negligence united with the negligence of a fel-

[1] Crispin *v.* Babbitt, 81 N. Y. 516.
[2] Lorentz *v.* Robinson, 61 Md. 64.
[3] Ashworth *v.* Stanwix, 3 El. & El. 701.

low-servant causes the injury, the master is liable, provided his negligence is a proximate concurring cause.[1]

§ 282. Negligent performance of non-assignable duties.

The non-assignable duties of the master have already been enumerated.[2] The master is bound to use due care in the performance of these duties and is liable to a servant injured in consequence of his failure to do so. If he negligently fails to furnish a safe place to work or safe instrumentalities, or a sufficient number of competent servants, or suitable rules and regulations, or proper warning of extraordinary risks, or proper inspection, he is liable to any servant injured in consequence of such negligent failure.[3] These are personal duties, and, whoever may be delegated to perform them, the law always treats the case as if the master were personally performing them. The degree of care required of the master in the discharge of these duties is said to be ordinary care, that is the care which reasonably prudent men would use under like circumstances.[4] This is so in the case of railroad companies,[5] although as to passengers they are bound to use the utmost care that human vigilance makes possible.[6] Accordingly the master is not bound to provide the very best or most approved appliances, but only those which are reasonably fit and safe.[7] Conformity to the usage of other similar employers does not of itself conclusively show due care.[8] Having supplied them he is not liable if a fellow-servant negligently fails to use them or to use them properly.[9] So if it is a part of the servant's own

[1] Cone *v.* Delaware, &c. R., 81 N. Y. 206; Ellis *v.* New York, &c. R., 95 N. Y. 546; Franklin *v.* R. Co., 37 Minn. 409.

[2] *Ante*, § 276.

[3] Cases cited in § 276, *ante*.

[4] Washington, &c. R. *v.* McDade, 135 U. S. 554; Painton *v.* Northern Cent. R.; 83 N. Y. 7; Probst *v.* Delamater, 100 N. Y. 266.

[5] Chicago, &c. R. *v.* Kerr, 148 Ill. 605.

[6] Carroll *v.* Staten Is. R., 58 N. Y. 126; Palmer *v.* Delaware & H. C. Co., 120 N. Y. 170.

[7] Harley *v.* Buffalo, &c. Co., 142 N. Y. 31; Conway *v.* Ill. Cent. R., 50 Iowa, 465.

[8] Wabash Ry. *v.* McDaniels, 107 U. S. 454.

[9] Harley *v.* Buffalo Car Mfg. Co., 142 N. Y. 31.

duty to construct for himself a scaffold or other appliance, and suitable material is furnished for this purpose, the master is not liable if it is improperly constructed,[1] whereas he would be liable if he supplied the scaffold to the servant ready constructed for the latter's use.[2] In the employment of fellow-servants, the master is bound to use reasonable care and diligence to select those who are competent and reliable and not to continue in the employment those who are unfit or unreliable.[3] If due diligence has been used in selecting a servant, subsequent facts disclosing unfitness must be brought actually or constructively to the master's notice before he will be deemed negligent in continuing the servant in the employment.[4] The master must also use due care to have a sufficient number of competent servants.[5] The same rule of due care applies in the promulgating and enforcing suitable rules for the government of the service,[6] giving warning of unusual or extraordinary risks,[7] though in the latter case it seems actual notice, and not due care to give notice, is the requirement.[8] So also due care is the test as to inspection and oversight of appliances and servants.[9]

§ 283. Assumption of risk.

The doctrine that the master is liable to the servant for the negligent failure to perform any one of the personal or

[1] Hogan *v.* Smith, 125 N. Y. 774; Marsh *v.* Herman, 47 Minn. 537.

[2] Manning *v.* Hogan, 78 N. Y. 615. *Cf.* Benzing *v.* Steinway, 101 N. Y. 547.

[3] Laning *v.* N. Y. Cent., &c. R., 49 N. Y. 521; Chapman *v.* Erie R., 55 N. Y. 579; Cameron *v.* N. Y. Cent., &c. R., 145 N. Y. 400; Wabash Ry. *v.* McDaniels, 107 U. S. 454.

[4] Whittaker *v.* Delaware, &c. R., 126 N. Y. 544; Cameron *v.* N. Y. Cent., &c. R., 145 N. Y. 400; Park *v.* N. Y. Cent., &c. R., 155 N. Y. 215. Some states permit evidence of general reputation for incompetency.

[5] Flike *v.* Boston, &c. R., 53 N. Y. 549; Pennsylvania Co. *v.* McCaffrey, 139 Ind. 430.

[6] Slater *v.* Jewett, 85 N. Y. 61; Abel *v.* Delaware, &c. Co., 103 N. Y. 581, 128 N. Y. 662.

[7] Mather *v.* Rillston, 156 U. S. 391; Fox *v.* Peninsular Lead Works, 84 Mich. 676.

[8] Wheeler *v.* Wason Mfg. Co., 135 Mass. 294.

[9] Byrne *v.* Eastmans Co., 163 N. Y. 461.

non-assignable duties, is subject to the qualification that the servant may voluntarily assume the risk arising from such failure.[1] By the contract of employment the master ordinarily assumes the risk as to the performance of these duties and the servant assumes all the other risks of the service.[2] But if, at the time the contract is made and the servant enters the employment, he knows and fully comprehends that the conditions then existing increase his risks[3] beyond those which, in the absence of such knowledge, he would otherwise expect to encounter, he is said to voluntarily assume the added risks and the master is relieved to that extent of the risks which he would otherwise be deemed to undertake.[4] The implied terms as to the risks are modified by the actual facts known and appreciated by the servant at the time of making the contract, or, to state another reason for the same result, the servant cannot recover damages for injuries arising from a danger which he voluntarily and with full appreciation of the risk encounters. If, therefore, the servant, with full knowledge and appreciation of the added danger, engages to work in an unsafe place (that is not as safe as due care on the part of the master would make it) he assumes the risk of the situation as it is and cannot recover from the master for an injury resulting from it.[5]

But what of risks arising subsequent to the contract, or not known to the servant until after he has entered upon the employment? In such a case it cannot be said that he impliedly contracted to assume them, unless, indeed, it be argued that he impliedly contracted to assume any risks of which he subsequently receives notice, a contention that

[1] See Bigelow on Torts (7th ed.), §§ 753–764.

[2] Consolidated Coal Co. *v.* Haenni, 146 Ill. 614.

[3] Mere knowledge of defects is not enough: there must also be an appreciation of the added risk. Cook *v.* R. Co., 34 Minn. 45.

[4] Coombs *v.* New Bedford Cordage Co., 102 Mass. 572; Mahoney *v.* Dore, 155 Mass. 513; Powers *v.* New York R., 98 N. Y. 274; Crown *v.* Orr, 140 N. Y. 450; Ragon *v.* Toledo R., 97 Mich. 265.

[5] Sweeney *v.* Berlin, &c. Co., 101 N. Y. 520; Knisley *v.* Pratt, 148 N. Y. 372; O'Maley *v.* South Boston Gaslight Co., 158 Mass. 135; Saxton *v.* Hawksworth, 26 L. T. N. S. 851. Cases *supra*.

would push the doctrine of the implied terms to its extreme limits. In such cases the courts fall back upon the maxim *volenti non fit injuria*, and hold that if the servant remains in the employment after a full knowledge and appreciation of the risk arising from the failure of the master to perform any one of the personal or non-assignable duties, and for such a length of time and under such circumstances as to be satisfactory evidence of his intent to assume the risk rather than abandon the service, the risk is shifted from the master to the servant and the latter cannot recover for an injury arising from it.[1] Whether the evidence is sufficient to establish a voluntary assumption of the risk is a question of fact.[2] Mere knowledge of the risk is not enough: the maxim is not "*scienti non fit injuria*" but "*volenti non fit injuria*."[3] Remaining in the employment after knowledge of the risk is not conclusive,[4] although, as in other similar cases, the court may think it conclusive under the facts and circumstances of a particular case.[5]

Whether there is any distinction between cases where the risk is primarily thrown on the employer by the common law and cases where it is imposed upon him by statute, the courts are not agreed. It is generally held that there may be an assumption by the servant of the general statutory risks enumerated in the Employers' Liability Acts.[6] But a distinction is taken between such cases and the case where the statute prescribes a specific duty, as the blocking of guard-rails and switches or the fencing of machinery, and the master fails to comply with the statute. In such a case some

[1] Ciriack *v.* Merchants' Woolen Co., 151 Mass. 152.

[2] Smith *v.* Baker, 1891, A. C. 325; Mahoney *v.* Dore, 155 Mass. 513; Great N. Ry. *v.* Kasischke, 104 Fed. Rep. 440.

[3] Smith *v.* Baker, *supra*, pp. 337, 355. But see Powers *v.* New York, &c. R., 98 N. Y. 274.

[4] *Ibid.*; Northern Pac. R. *v.* Mares, 123 U. S. 710; Hawley *v.* Northern Central R., 82 N. Y. 370.

[5] M'Peck *v.* Central Vt. R., 79 Fed. Rep. 590; Powers *v.* New York, &c. R., 98 N. Y. 274.

[6] O'Maley *v.* South Boston Gaslight Co., 158 Mass. 135.

courts hold that the risk cannot be shifted to the servant,[1] while other courts hold that it may.[2] Assumption of risk is to be clearly distinguished from contributory negligence which is a bar whether the master's duties arise at common law or by statute.[3]

While the doctrine of the assumption of the risk is thus firmly established, it is subject to certain important qualifications which may now be briefly enumerated.

(1) The servant must know and clearly appreciate the risk arising from the master's failure to perform one of the prescribed duties. In other words the assumption of the risk must be really voluntary. This is a question of fact and should ordinarily be left to the jury.[4] The facts may, however, be so obvious that the court will determine as an indisputable inference that the servant did assume the risks.[5] Risks existing at the time the servant enters the employment, and of which he has actual or constructive notice, are generally held to be voluntarily assumed.[6] Risks arising after he enters the service are not shifted to the servant until he has consciously and voluntarily encountered them for such a time as to be satisfactory evidence of assumption.[7]

(2) The servant must not be acting under coercion, as a convict[8] or a seaman,[9] or a terrorized foreigner,[10] or, possibly, a minor.[11] But a fear of discharge, or a threat of discharge,

[1] Narramore *v.* Cleveland, &c. Ry., 96 Fed. Rep. 298.

[2] Knisley *v.* Pratt, 148 N. Y. 372, 149 N. Y. 582.

[3] Narramore *v.* Cleveland, &c. Ry., 96 Fed. Rep. 298; Freeman *v.* Glens Falls Paper Mill Co., 70 Hun, 530, affirmed 142 N. Y. 639.

[4] Smith *v.* Baker, 1891, A. C. 325.

[5] O'Maley *v.* South Boston Gaslight Co.,158 Mass. 135. See the difference of judicial opinion in Davis *v.* Forbes, 171 Mass. 548.

[6] Coombs *v.* New Bedford Cordage Co., 102 Mass. 572; Mahoney *v.* Dore, 155 Mass. 513; Crown *v.* Orr, 140 N. Y. 450. But see Wallace *v.* Central Vermont R., 138 N. Y. 302.

[7] Smith *v.* Baker, 1891, A. C. 325; Libby *v.* Scherman, 146 Ill. 540.

[8] Chattahoochee Brick Co. *v.* Braswell, 92 Ga. 631.

[9] Eldridge *v.* Atlas Steamship Co., 134 N. Y. 187.

[10] Wells & F. Co. *v.* Gortorski, 50 Ill. App. 445.

[11] Brazil Coal Co. *v.* Gaffney, 119 Ind. 455; Kehler *v.* Schwenk, 151 Pa. St. 505. Infancy in and of itself does not prevent the assumption of risk

is not coercion,[1] though it seems to be considered by some courts evidence that the servant was not acting voluntarily.[2]

(3) The servant must not be acting under necessity, as where a new risk arises subsequent to the employment which he must for the once reluctantly encounter.[3]

(4) If the master promises to remedy the defect the servant does not assume the risk during such time as may reasonably be allowed for the performance of the promise,[4] or until all reasonable expectation that the promise will be performed is at an end,[5] unless the danger is so imminent that no prudent person would encounter it.[6]

(5) The servant may reasonably rely upon the master's superior judgment in case the latter assures him there is no danger, unless the danger is so obvious that the assurance ought not to influence the conduct of a reasonably prudent man in like circumstances.[7]

§ 284. Contributory negligence.

The doctrine that the master is liable to the servant for the negligent failure to perform any one of the personal or non-assignable duties, is subject to the further qualification that the servant cannot recover for injuries due in any proximate degree to his own contributory negligence.[8] This is

De Graff *v.* New York Cent., &c. R., 76 N. Y. 125; Michael *v.* Stanley, 75 Md. 464.

[1] Sweeney *v.* Berlin, &c. Co., 101 N. Y. 520; Dougherty *v.* West Superior Iron Co., 88 Wis. 343.

[2] Mason *v.* Richmond, &c. R., 111 N. C. 482; Richmond, &c. R. *v.* Norment, 84 Va. 167.

[3] Fitzgerald *v.* Connecticut Paper Co., 155 Mass. 155.

[4] Illinois Steel Co. *v.* Mann, 170 Ill. 200.

[5] *Ibid.*, dissenting opinion.

[6] Hough *v.* Texas, &c. R., 100 U. S. 213; Northern Pac. R. *v.* Babcock, 154 U. S. 190; Smith *v.* Backus, 64 Minn. 447; Laning *v.* N. Y. Cent., &c. R., 49 N. Y. 521; Indianapolis, &c. R. *v.* Watson, 114 Ind. 20.

[7] Chicago Brick Co. *v.* Sobkowiak, 148 Ill. 573; Wagner *v.* Jayne Chemical Co., 147 Pa. St. 475; Haas *v.* Balch, 56 Fed. Rep. 984. *Cf.* Davis *v.* Forbes, 171 Mass. 548.

[8] Elliott *v.* Chicago, &c. Ry., 150 U. S. 245; Pennsylvania R. *v.* Zink, 126 Pa. St. 288.

merely a part of the general doctrine of contributory negligence. The distinction between assumption of risk and contributory negligence must be kept in mind.[1] Both issues may be raised in the same case. For instance, plaintiff alleges that the platform on which he worked was unsafe and that it was unlighted. If it was unsafe the question is, did he assume the risk? If it was unlighted but suitable torches were furnished which plaintiff failed to use, the question is, was plaintiff guilty of contributory negligence?[2]

§ 285. **Wilful torts.**

A master is liable to a servant for wilful torts committed against him as he is to any other person. In certain cases, however, the law allows a defence of justification or excuse or privilege based upon the relationship, as, for instance, the defence of discipline in an action for assault upon a seaman,[3] or of privileged communication in an action for slander in giving the servant a bad character.

If a master is asked the character of a servant who is or has been in his employ his communication to another actual or prospective master is conditionally privileged.[4] If he volunteers the information he may be privileged under certain circumstances, but stronger evidence of *bona fides* will be required.[5] If he has given a favorable character and afterwards discovers facts which lead him to doubt the character of the servant, he is privileged to volunteer the new facts to the employer.[6] If he dismisses a servant, he may inform his other servants of the reason.[7] His conditional privilege is overcome, however, by proof of express malice. That what he said was false is not proof of malice; but that he knew

[1] Narramore *v.* Cleveland, &c. R., 96 Fed. Rep. 298.

[2] Kaare *v.* Troy Steel Co., 139 N. Y. 369.

[3] Michaelson *v.* Denison, 3 Day (Conn.), 294; Brown *v.* Howard, 14 Johns. (N. Y.) 119.

[4] Pattison *v.* Jones, 8 B. & C. 578.

[5] *Ibid.*

[6] Fowles *v.* Bowen, 30 N. Y. 20.

[7] Somerville *v.* Hawkins, 10 C. B. 583; Hunt *v.* Great N. Ry., 1891, 2 Q. B. 189.

it to be false is the best evidence, and that he knew it to be false may be inferred from the fact that he is giving a bad character in order to compel the servant to remain in his own service.[1]

At common law a master is under no obligation to give his servant a letter of recommendation or any statement as to his character upon the termination of the relationship.[2] This question has been revived in modern cases in consequence of a system of "clearance cards" adopted by railroads whereby an employee leaving the service is given a statement as to the cause of his departure from it. But it is held that in the absence of a contract to give such a card, or of an established usage in view of which contracts of service are made, there is no obligation resting upon the master to give the card.[3] But it has been held that when a class of employers mutually agree not to employ a servant formerly in the service of another without the presentation of a clearance card, that it becomes the duty of any party to such agreement to give a clearance card to a servant entitled to it, and that withholding it is equivalent to a statement that the servant is within a proscribed class.[4]

Blacklisting employees, that is circulating a list of discharged employees among a class of employers who have an understanding that they will not employ persons so listed, is an actionable wrong for which the blacklisted employee may have an action at law,[5] but not, it seems, an injunction.[6] Many states make such blacklisting a crime.[7]

[1] Jackson *v.* Hopperton, 16 C. B. N. S. 829.

[2] Carrol *v.* Bird, 3 Esp. 201; Cleveland, &c. R. *v.* Jenkins, 174 Ill. 398.

[3] Cleveland, &c. R. *v.* Jenkins, *supra.*

[4] New York, &c. Ry. *v.* Schaffer, 17 Ohio Circ. Ct. Rep. 77.

[5] Blumenthal *v.* Shaw, 77 Fed. Rep. 954; Hundley *v.* Louisville, &c. R. (Ky.), 48 S. W. 429; Mattison *v.* L. S. & M. S. Ry., 3 Oh. Dec. 526.

[6] Worthington *v.* Waring, 157 Mass. 421.

[7] Colorado L. 1897, c. 31; Conn. L. 1897, c. 184; Iowa Code, § 5027; Minn. L. 1892, c. 174; Mo. L. 1891, p. 122; N. Dak. Const., § 212, Code, § 7042; Wis. Stat., § 4466 *b.*

PART IV.

LIABILITY OF SERVANT FOR TORTS.

§ 286. Introductory.

A servant's torts may be either those of non-feasance or those of misfeasance. The injured party may be either the master, a fellow-servant, or a stranger. We have now to consider each of these cases.

CHAPTER XXVI.

SERVANTS' LIABILITY FOR TORTS.

1. *Liability to master.*

§ 287. Gratuitous service.

We have already seen that if one without consideration promises to do a service for another, that not doing the service at all is no actionable wrong, however seriously the promisee may be damaged thereby.[1] This is a mere non-feasance, and as there is no consideration for the promise no action can be maintained.

But if the gratuitous agent enter upon the performance of the duty and is negligent or unskilful where he may reasonably be held to have undertaken for care and skill, the employer may recover damages for the injury occasioned thereby.[2] If one intrust a horse to another as gratuitous servant or bailee to be shown to a third person, and the gratuitous servant, being conversant with and skilled in horses, negligently rides the horse upon slippery grounds so that it falls and is injured, the gratuitous servant or bailee is liable.[3]

The distinction here taken between non-feasance and misfeasance in the case of a gratuitous agent or servant sued by the employer, is taken as to a paid servant sued by a third person who is injured in consequence of the servant's negligence.

§ 288. Paid service.

If the servant agrees upon a consideration to perform a service and neglects to do so to the damage of the master,

[1] *Ante*, §§ 29, 97; Wilkinson *v.* Coverdale, 1 Esp. 75; Thorne *v.* Deas, 4 Johns. (N. Y.) 84.

[2] *Ante*, §§ 97–98; Whitehead *v.* Greetham, 2 Bing. 464.

[3] Wilson *v.* Brett, 11 M. & W. 113.

the latter may maintain an action for the loss.[1] In such a case it is immaterial whether the negligence is merely a non-feasance or a misfeasance, since the consideration supports the promise to act, and to act with care and skill.

For any negligence in the discharge of his duties resulting in damage to the master, the servant is liable,[2] but not for accidental loss or injury not due to negligence.[3] If, in consequence of the servant's wrongful act, the master, being himself not personally at fault, is obliged to pay damages to a third person, he may recoup the same from the servant by way of indemnity.[4]

2. *Liability to fellow-servant.*

§ 289. Servant liable to co-servant for misfeasance.

There can be no doubt of one servant's liability to another for any wilful tort.[5]

Notwithstanding the authority of some early cases,[6] it is established law that one servant is also liable to a fellow-servant for negligence in the performance of the duties of the service.[7] But some courts make a subtle distinction between misfeasance and non-feasance, and hold the negligent servant

[1] *Ante*, §§ 88–89.

[2] Countess of Salop *v.* Crompton, Cro. Eliz. 777; Lewson *v.* Kirk, Cro. Jac. 265; Mobile, &c. R. *v.* Clanton, 59 Ala. 392; Gilson *v.* Collins, 66 Ill. 136.

[3] Savage *v.* Walthew, 11 Mod. 135; Walker *v.* Guarantee Ass'n, 18 Q. B. 277; Rechtscherd *v.* Accommodation Bank, 47 Mo. 181; Page *v.* Wells, 37 Mich. 415; Johnson *v.* Martin, 11 La. An. 27.

[4] Green *v.* New River Co., 4 T. R. 589; Pritchard *v.* Hitchcock, 6 M. & G. 151; Grand Trunk Ry. *v.* Latham, 63 Me. 177; Challiss *v.* Wylie, 35 Kans. 506; Oceanic, &c. Nav. Co. *v.* Compania, &c. Espanola, 134 N. Y. 461, 467.

[5] Reg. *v.* Huntley, 3 Car. & K. 142.

[6] Southcote *v.* Stanley, 1 Hurl. & N. 247 (*dictum*); Albro *v.* Jaquith, 4 Gray (Mass.), 99.

[7] Osborne *v.* Morgan, 130 Mass. 102; Griffiths *v.* Wolfram, 22 Minn. 185; Greenberg *v.* Whitcomb Lumber Co., 90 Wis. 225; Lawton *v.* Waite, 103 Wis. 244; Daves *v.* Southern Pac. Co., 98 Cal. 19; Martin *v.* Louisville, &c. R., 95 Ky. 612; Warax *v.* Cincinnati, &c. R., 72 Fed. Rep. 637.

liable to the injured servant for the former but not for the latter.[1] While the distinction is a valid one between bare non-feasance (not doing at all) and misfeasance (doing ill either by commission or omission after performance begun), the distinction between commission and omission after performance is once begun has led to considerable confusion. This subject will be discussed in the succeeding sections.

3. *Liability to third persons.*

§ 290. Liable for misfeasance, but not for non-feasance.

In dealing with the liability of the servant for his torts we are met at the outset with the distinction between non-feasance and misfeasance. The statement is that a servant is liable to third persons (including fellow-servants) for his misfeasance resulting in injury, but not for his non-feasance; that as to the first he cannot shield himself behind the plea that he was acting in behalf of, or under the command of, a master, since every man is liable for his own positive wrongs,[2] but that as to the second, he is liable only to the master, since no one but the master can complain that a servant has not done what he undertook to do.[3] It becomes necessary, therefore, to examine these two concepts of the law as bearing upon the liability of an agent for his torts.

§ 291. Meaning of non-feasance.

"Non-feasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; and malfeasance is the doing of an act which a person ought not to do at all."[4]

[1] Burns *v.* Pethcal, 75 Hun (N. Y.), 437; Murray *v.* Usher, 117 N. Y. 542.

[2] Perkins *v.* Smith, 1 Wils. 328; Weber *v.* Weber, 47 Mich. 569; Phelps *v.* Wait, 30 N. Y. 78; Johnson *v.* Barber, 10 Ill. 425; Mitchell *v.* Harmony, 13 How. (U. S.) 115; Estes *v.* Worthington, 30 Fed. Rep. 465.

[3] Lane *v.* Cotton, 12 Mod. 472, 488; Whitfield *v.* Lord Le Despencer, 2 Cowp. 754; Denny *v.* Manhattan R., 2 Denio, 115, affirmed 5 *Ibid.* 639; cases cited in succeeding section.

[4] Bell *v.* Josselyn, 3 Gray (Mass.), 311.

Strictly, as applied to this subject, non-feasance means the not doing at all by a servant of the thing which by his undertaking with the master he has agreed to do. Strictly, it does not extend to a case where a servant has once entered upon the performance of the contractual obligation and then neglected to do something which by his contract or promise he has undertaken to do. This is the view taken of the distinction between non-feasance and misfeasance in cases of gratuitous agencies where the question arises between principal and agent,[1] and it is the view taken by the best considered authorities in cases of negligence arising between an agent or servant and third persons. "It is often said in the books that an agent is responsible to third persons for misfeasance only, and not for non-feasance. And it is doubtless true that if an agent never does anything toward carrrying out his contract with his principal, but wholly omits or neglects to do so, the principal is the only person who can maintain any action against him for the non-feasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not non-feasance, or doing nothing; but it is misfeasance, doing improperly."[2]

Suppose that a representative undertakes the general management of real estate, agreeing to lease it, collect the rents, pay the taxes, keep it insured, repair it when necessary and so on, and that he enters upon the performance of his duties, all of which he faithfully performs except as to the repairs, and that, as to those, he allows the premises to be so dangerously

[1] Thorne *v.* Deas, 4 Johns. (N. Y.) 84; *ante*, §§ 97, 286.

[2] Osborne *v.* Morgan, 130 Mass. 102. And see Bell *v.* Josselyn, 3 Gray (Mass.), 309, where a servant was held liable for negligently failing to examine the state of water-pipes before letting the water into them, whereby a lower tenant's rooms were flooded and damaged.

out of repair that X is injured in consequence of their defective condition; can X recover for his injuries against the representative? The question has been answered in the negative on this state of facts by the Federal courts and the courts of the state of Louisiana,[1] and these cases are now regarded as the leading American authorities.[2] Another court has reached the same conclusion where it was alleged that the omission of the representative was malicious and with the intent to injure the plaintiff.[3] Other courts, however, have taken the opposite view, holding that the representative is liable for his own negligent omissions in the management of his principal's premises, where he has once entered upon the discharge of his duties.[4]

The latter view seems more consonant with sound principles, for it distinguishes between negligence and non-feasance. Had the representative entered upon the repair of the premises and done his work ill, he would undoubtedly have been liable.[5] Why not also when he enters upon the care of the premises by taking "possession" of them for his employer and doing all that a possessor should except repair? If non-feasance were confined to cases where the representative simply fails to enter upon the performance of his duties at all, much confusion would be avoided and a fundamental principle of personal obligation for one's own acts and omissions would be vindicated.[6]

Yet under the latter view it must be observed that the representative cannot be held to a continuing liability for the negligent condition of premises or for negligent and dangerous structures. He might be liable so long as he remains

[1] Delaney *v.* Rochereau, 34 La. An. 1123; Carey *v.* Rochereau, 16 Fed. Rep. 87.

[2] See also Murray *v.* Usher, 117 N. Y. 542; Van Antwerp *v.* Linton, 89 Hun (N. Y.), 417; Dean *v.* Brock, 11 Ind. App. 507.

[3] Feltus *v.* Swan, 62 Miss. 415.

[4] Baird *v.* Shipman, 132 Ill. 16; Campbell *v.* Portland Sugar Co., 62 Me. 552, 566; Mayer *v.* Hutchinson Building Co., 104 Ala. 611.

[5] Harriman *v.* Stowe, 57 Mo. 93.

[6] See Kelly *v.* Metropolitan Ry., 1895, 1 Q. B. 944.

in control, but not after he has surrendered control to his employer or departed the service.[1]

§ 292. Misfeasance.

Differences of opinion exist as to whether particular omissions of duty constitute non-feasance or misfeasance, but there is general agreement that for all of his acts or omissions constituting misfeasance the agent or servant is personally liable.[2] For all wilful torts he is clearly liable.[3] For all negligent torts amounting to misfeasance he is as clearly liable.[4] The obligation imposed by the law upon all persons cannot be disturbed by the creation of new relations by contract or other undertaking to which the injured person is not a party. But it must appear that the servant was in fact negligent; the mere fact that some act of his was a remote cause of damage is not enough.[5]

Whether the master and servant may be joined in one action as joint tort-feasors, has already been considered.[6]

§ 293. Liability for torts of fellow-servants.

A servant is not liable for the torts of his fellow-servants in which he did not participate even though he is their superior officer.[7] To this there is an exception in the case of a ship-master who is liable for the negligence of all on ship-board to the same extent as if he were acting for himself alone and the employees were his own servants.[8] So also the managing editor of a paper is liable for a libel published in it

[1] Baird *v.* Shipman, *supra*. *Cf.* Curtin *v.* Somerset, 140 Pa. St. 70; Daugherty *v.* Herzog, 145 Ind. 255.

[2] *Ante*, §§ 211-214.

[3] *Ibid.*

[4] Phelps *v.* Wait, 30 N. Y. 78; Bell *v.* Josselyn, 3 Gray (Mass.), 309; Mayer *v.* Hutchinson Building Co., 104 Ala. 611; Wright *v.* Compton, 53 Ind. 337; Johnson *v.* Barber, 10 Ill. 425; Harriman *v.* Stowe, 57 Mo. 93.

[5] Hill *v.* Caverly, 7 N. H. 215.

[6] *Ante*, § 214; Warax *v.* Cincinnati, &c. R., 72 Fed. Rep. 637, and cases there cited.

[7] Stone *v.* Cartwright, 6 T. R. 411; Brown *v.* Lent, 20 Vt. 529.

[8] Kennedy *v.* Ryall, 67 N. Y. 379.

to the same extent as if he were the proprietor, and this is so whether he knows of the publication or not.[1]

§ 294. **Public servants; acts of state.**

The rule of personal liability for torts extends to public as well as to private servants. A public principal is not ordinarily liable for the torts of his subordinates,[2] but each subordinate is liable for his own torts, and cannot shield himself behind the command of his superior.[3]

To this rule there is one exception. A public agent is not liable to the subject of a foreign state for an act done under authority of the agent's state or duly ratified by the state.[4] In such cases the relief of the party injured must be sought through his own state department from the government of the wrongdoer. This doctrine is applicable only when the wrongdoer and the injured party are subjects of different states and only when the wrongdoer's state authorizes or ratifies his act. The defence of an "Act of State" is not applicable between subjects or citizens of the same state.[5] In such cases the actor is protected only if his act was in fact lawful.

[1] Smith *v.* Utley, 92 Wis. 133.

[2] *Ante*, § 260.

[3] Mitchell *v.* Harmony, 13 How. (U. S.) 115; Terrill *v.* Rankin, 2 Bush (Ky.), 453; Head *v.* Porter, 48 Fed. Rep. 481; Stanley *v.* Schwalby, 85 Tex. 348.

[4] Buron *v.* Denman, 2 Ex. 167; Secretary of State for India *v.* Kamachee Boye Sahaba, 7 Moo. Ind. App. 476, 13 Moo. P. C. 22; Dow *v.* Johnson, 100 U. S. 158.

[5] Walker *v.* Baird, 1892, A. C. 491; Head *v.* Porter, 48 Fed. Rep. 481.

PART V.

LIABILITY OF THIRD PERSON FOR TORTS TO MASTER OR SERVANT.

§ 295. Introductory.

A third person may render himself liable to the master by injuring the servant so as to impair the value of his services, by seducing the servant, or by enticing the servant away from the service. He may render himself liable to the servant by procuring his discharge from the service or by inducing a prospective master not to employ him.

CHAPTER XXVII.

LIABILITY OF THIRD PERSON FOR TORTS.

§ 296. Personal injuries to servant.

A master is entitled to the services of his servant, and one who injures or restrains the servant so as to render him unfit to labor is liable to the master for the resulting damages occasioned by the loss of services whether the injury be wilful or negligent.[1] Thus the third person is liable for an assault,[2] false arrest,[3] false imprisonment,[4] negligence,[5] or other tort[6] to the servant which deprives the master of the services to which he is entitled. To this rule there are two qualifications resting upon authority but of doubtful validity: (1) if the defendant is under a contract duty toward the servant to carry him safely and owing to the breach of this duty the servant is injured, negligently or intentionally, the master cannot recover;[7] (2) if the injury to the servant results in instantaneous death the master cannot recover.[8] Both of these exceptions seem to be without solid foundation and both have been criticised and condemned.[9]

[1] Gilbert *v.* Schwenck, 14 M. & W. 488; Hall *v.* Hollander, 4 B. & C. 660; Dixon *v.* Bell, 5 M. & S. 198; Ames *v.* Union Ry. Co., 117 Mass. 541; St. Johnsbury, &c. R. *v.* Hunt, 55 Vt. 570; *ante*, § 176.

[2] Gilbert *v.* Schwenck, *supra*.

[3] St. Johnsbury, &c. R. *v.* Hunt, *supra*.

[4] Woodward *v.* Washburn, 3 Denio (N. Y.), 369.

[5] Dixon *v.* Bell, 5 M. & S. 198.

[6] Durden *v.* Barnett, 7 Ala. 169.

[7] Alton *v.* Midland Ry., 19 C. B. N. S. 213; Fairmount Ry. *v.* Stutler, 54 Pa. St. 375; Bigelow on Torts (7th ed.), §§ 390, 801–804.

[8] Osborn *v.* Gillett, L. R. 8 Ex. 88; Bigelow on Torts (7th ed.), § 391.

[9] Pollock on Torts (5th ed.), pp. 59–61, 512–514. See also Ames *v.* Union Ry., *supra*.

A parent recovers under the theory of service for injuries to a minor child, and may also recover as damages the necessary expenses incurred for medical attendance and care.[1]

§ 297. Seduction of servant.

Akin to the action for injury to a servant is the action for seduction of a female child or servant to whose services the parent or master is entitled.[2] In such case the parent recovers ostensibly for loss of service and must show some slight service[3] or right to service[4] as the basis of his action.[5] It is not enough to prove the seduction merely; damages from loss of services must also be shown. English cases seem to require proof of pregnancy or other disabling disease,[6] but the American cases are to the effect that where the proximate result of the seduction is a loss of health incapacitating the daughter for service the damages are sufficiently established.[7] While loss of service or the right to service must be shown as the basis of the action, the law allows additional substantial damages to be awarded to the parent for the humiliation and injury to his feelings resulting from the seduction.[8]

If after the death of the father the daughter remains with and serves the mother, the latter may maintain an action for seduction based upon the loss of service.[9] So any person actually standing *in loco parentis* may maintain an action, as

[1] Hunt *v.* Wotton, T. Raym. 259; Dennis *v.* Clark, 2 Cush. (Mass.) 347; Horgan *v.* Pacific Mills, 158 Mass. 402.

[2] Bigelow on Torts (7th ed.), §§ 256–273.

[3] Bennett *v.* Allcott, 2 T. R. 166; Carr *v.* Clarke, 2 Chit. Rep. 260.

[4] Martin *v.* Payne, 9 Johns. (N. Y.) 387, disapproving Dean *v.* Peel, 5 East, 45; Mulvehall *v.* Millward, 11 N. Y. 343; Furman *v.* Van Sise, 56 N. Y. 435.

[5] Grinnell *v.* Wells, 7 M. & G. 1033; Bartley *v.* Richtmyer, 4 N. Y. 38.

[6] Eager *v.* Grimwood, 1 Ex. 61.

[7] Abrahams *v.* Kidney, 104 Mass. 222; White *v.* Nellis, 31 N. Y. 405.

[8] Phelin *v.* Kenderdine, 20 Pa. St. 354; Fox *v.* Stevens, 13 Minn. 272; Lipe *v.* Eisenlerd, 32 N. Y. 229; Lawyer *v.* Fritcher, 130 N. Y. 239.

[9] Moran *v.* Dawes, 4 Cow. (N. Y.) 412; Gray *v.* Durland, 51 N. Y. 424; Furman *v.* Van Sise, 56 N. Y. 435; Abrahams *v.* Kidney, 104 Mass. 222.

a step-father, brother, aunt, or cousin,[1] or any person who is actually a master though not a relative,[2] though in the latter case damages would probably be for loss of service only.[3]

The consent of the daughter cannot bar the parent's action. The consent of the parent, however, bars his action [4] or perhaps such misconduct in the parental relation as contributed to the injury.[5] But if the parent's consent to a marriage be obtained by the false representation of the defendant that he is single, the parent may maintain an action for seduction.[6]

§ 298. Enticing away a servant.

A third person who with notice [7] of the existence of the relation of master and servant entices or procures the servant to quit the employment,[8] or who, with notice of the relation, harbors and keeps the servant of another as his servant,[9] is liable to the master for all damages resulting therefrom.[10] "A person who with notice interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harboring and keeping him as servant after he has quit it, and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law." [11]

[1] Howard *v.* Crowther, 8 M. & W. 601; Davidson *v.* Goodall, 18 N. H. 423; Wood on M. & S. § 244.

[2] Fores *v.* Wilson, Peake, 55.

[3] Bigelow on Torts (7th ed.), § 273.

[4] Hollis *v.* Wells, 3 Penn. L. J. 169; Seagar *v.* Slingerland, 2 Cai. (N. Y.) 219.

[5] Reddie *v.* Scoolt, Peake, 240; Anthon's N. P. (N. Y.) 267.

[6] Lawyer *v.* Fritcher, 130 N. Y. 239.

[7] Fores *v.* Wilson, Peake, 55; Stuart *v.* Simpson, 1 Wend. (N. Y.) 376; Butterfield *v.* Ashley, 6 Cush. (Mass.) 249; Clark *v.* Clark, 63 N. J. L. 1.

[8] Hart *v.* Aldridge, Cowp. 54; Scidmore *v.* Smith, 13 Johns. (N. Y.) 322; Carew *v.* Rutherford, 106 Mass. 1; Bixby *v.* Dunlap, 56 N. H. 456; Jones *v.* Blocker, 43 Ga. 331; Haskins *v.* Royster, 70 N. C. 601.

[9] Blake *v.* Lanyon, 6 T. R. 221; Sargent *v.* Mathewson, 38 N. H. 54; Caughey *v.* Smith, 47 N. Y. 244.

[10] *Ante*, § 176.

[11] Crompton, J., in Lumley *v.* Gye, 2 El. & Bl. 216. In this case an

Such relation may arise from contract or from status, as in the case of an infant [1] or a wife.[2] In an action for enticement it must appear that the servant is actually in the service; if he has already abandoned it the defendant cannot be said to have enticed him away.[3] Whether there must be a binding contract or obligation to serve is not clear. Where the enticement of one actually rendering service is for an immoral purpose, and not in the way of competition, it is held that it is immaterial that there is no binding contract of service.[4] But where the enticement is for a competitive purpose, that is, where defendant entices the servant at will of plaintiff to leave plaintiff's employment and enter defendant's, the decisions are in conflict.[5]

As to who is a servant within the meaning of this doctrine there is some conflict. In a leading English case it was held that enticing away an actress was actionable,[6] while in an American case this was held non-actionable.[7] In most jurisdictions, however, this narrower question has ceased to be of importance in view of the broader doctrine concerning the liability for inducing breach of contract.

The doctrine that it is actionable to induce a servant to commit a breach of a contract of service has been generalized into the more comprehensive doctrine that it is actionable to induce

actress was induced to quit the employment of a theatre manager. It was held that defendant was liable to the employer. Coleridge, J., dissented, maintaining that the sole liability rested upon the Statute of Laborers (23 Edw. III.), and that the actress was not a servant within the meaning of that statute.

[1] Caughey *v.* Smith, *supra;* Lawyer *v.* Fritcher, 130 N. Y. 239.

[2] Winsmore *v.* Greenbank, Willes, 577; Hutcheson *v.* Peck, 5 Johns. (N. Y.) 196; Hadley *v.* Heywood, 121 Mass. 236. The action of a husband is not, however, solely for loss of service, but includes the loss of *consortium* as well.

[3] Caughey *v.* Smith, *supra.*

[4] Evans *v.* Walton, L. R. 2 C. P. 615; Ball *v.* Bruce, 21 Ill. 161; Noice *v.* Brown, 39 N. J. L. 569.

[5] Salter *v.* Howard, 43 Ga. 601 (actionable); Campbell *v.* Cooper, 34 N. H. 49 (non-actionable). See next section.

[6] Lumley *v.* Gye, 2 El. & Bl. 216.

[7] Bourlier Bros. *v.* Macauley, 91 Ky. 135.

any contractor to commit a breach of his contract,[1] although some cases have held that this generalization is unsound.[2] All jurisdictions agree that it is actionable to procure a breach of contract by the employment of intrinsically unlawful means, as force or fraud;[3] and this is so even if the contract be an unenforceable one.[4]

§ 299. **Procuring discharge or non-employment of servant.**

It is also actionable to induce or persuade a master to discharge his servant with whom he has a binding contract of service,[5] except in those jurisdictions which refuse to recognize the general rule that it is actionable to procure a breach of contract by mere persuasion.[6] Even in those jurisdictions it is actionable if unlawful means are used as force, intimidation, or fraud.[7]

Is it actionable to induce or persuade a master to discharge a servant-at-will, that is a servant who may be discharged without committing a breach of contract? It has recently been held in England, overruling prior cases, that it is not unless unlawful means are used to produce the discharge.[8] But the general American doctrine seems to be otherwise, and to proceed upon the theory that intentionally causing damage to the servant by inducing his discharge is actionable unless it can be justified.[9]

[1] Lumley *v.* Gye, *supra;* Bowen *v.* Hall, 6 Q. B. Div. 333; Temperton *v.* Russell, 1893, 1 Q. B. 715; Walker *v.* Cronin, 107 Mass. 555; Moran *v.* Dunphy (Mass.), 59 N. E. 125; Angle *v.* Chicago, &c. Ry., 151 U. S. 1; Jones *v.* Stanly, 76 N. C. 355.

[2] Ashley *v.* Dixon, 48 N. Y. 430; Chambers *v.* Baldwin, 91 Ky. 121; Boyson *v.* Thorn, 98 Cal. 578; Glencoe Land, &c. Co. *v.* Commission Co., 138 Mo. 439.

[3] *Ibid.;* Aldridge *v.* Stuyvesant, 1 Hall (N. Y.), 210.

[4] Benton *v.* Pratt, 2 Wend. (N. Y.) 385; Rice *v.* Manley, 66 N. Y. 82.

[5] Chipley *v.* Atkinson, 23 Fla. 206.

[6] Note 2, *supra.*

[7] *Supra.* See Shoe Co. *v.* Saxey, 131 Mo. 212; Wick China Co. *v.* Brown, 164 Pa. St. 449.

[8] Allen *v.* Flood, 1898, A. C. 1. See also National Protective Ass'n *v.* Cumming, 53 N. Y. App. Div. 227.

[9] Plant *v.* Woods, 176 Mass. 492; Curran *v.* Galen, 152 N. Y. 33.

"In view of the series of decisions by this court, we cannot admit a doubt that maliciously and without justifiable cause to induce a third person to end his employment of the plaintiff, whether the inducement be false slanders or successful persuasion, is an actionable tort. . . . In the case of a contract of employment, even when the employment is at will, the fact that the employer is free from liability for discharging the plaintiff does not carry with it immunity to the defendant who has controlled the employer's action to the plaintiff's harm." [1]

What is here said of inducing an employer to discharge a servant-at-will is also applicable to cases where an employer of labor is induced not to engage the services of plaintiff at all. [2] In neither case is the employer guilty of any breach of an obligation; the wrong, if any, is that of the defendant in interfering with the plaintiff's occupation or means of livelihood.

§ 300. Summary of law as to interference with contractual relations.

It will be observed that there are two different views entertained as to the basis of liability for interference with contract relations.

(1) The first is that there is no tort unless either (*a*) the act induced is itself unlawful, namely, the breach of a binding contract, or (*b*) the means used to induce the act are unlawful; [3] And two jurisdictions admit only the second test in any case (except possibly the enticement of servants from their masters). [4] What constitutes unlawful means, and, particularly, what constitutes intimidation or coercion, cannot be regarded as settled. [5] (2) The second doctrine is that it is

[1] Holmes, C. J., in Moran *v.* Dunphy (Mass.), 59 N. E. 125.

[2] Blumenthal *v.* Shaw, 77 Fed. Rep. 954.

[3] Allen *v.* Flood, 1898, A. C. 1.

[4] Chambers *v.* Baldwin, 91 Ky. 121; Bourlier Brothers *v.* Macauley, 91 Ky. 135; Boyson *v.* Thorn, 98 Cal. 578.

[5] Vegelahn *v.* Guntner, 167 Mass. 92; O'Neil *v.* Behanna, 182 Pa. St. 236; Mackall *v.* Ratchford, 82 Fed. Rep. 41.

an actionable tort to inflict intentional damage upon the plaintiff by inducing another to break a contract with him, or to terminate one without breach, or not to enter into one, unless there be a lawful excuse or justification for so doing.[1] What constitutes lawful excuse or justification cannot be regarded as settled.[2]

[1] Walker *v.* Cronin, 107 Mass. 555; Moran *v.* Dunphy (Mass.), 59 N. E. 125; Chipley *v.* Atkinson, 23 Fla. 206; Graham *v.* St. Charles Ry., 47 La. An. 214, 1656.

[2] Vegelahn *v.* Guntner, 167 Mass. 92; Hopkins *v.* Oxley Stave Co., 83 Fed. Rep. 912. See 37 Am. Law Reg. N. S. p. 273.

APPENDIX.

NEW YORK FACTORS ACT, 1830.

L. 1830, c. 179.

An Act for the Amendment of the Law Relative to Principals and Factors or Agents.

§ 1. A person in whose name any merchandise shall be shipped, shall be deemed the true owner thereof, so far as to entitle the consignee of such merchandise to a lien thereon,

1. For any money advanced, or negotiable security given by such consignee, to or for the use of the person in whose name such shipment is made; and,

2. For any money or negotiable security received by the person in whose name such shipment is made, to or for the use of such consignee.

§ 2. Such lien does not exist where the consignee has notice by the bill of lading or otherwise, when or before money is advanced or security is given by him, or when or before such money or security is received by the person in whose name the shipment is made, that such person is not the actual and *bona fide* owner thereof.[1]

§ 3. Every factor or other agent, intrusted with the possession of any bill of lading, custom-house permit, or warehouse-keeper's receipt for the delivery of any such merchandise, and every such factor or agent not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with

[1] Sects. 1 and 2 are now cited as § 72 of "The Lien Law" (L. 1897, c. 418, repealing §§ 1 and 2 of L. 1830, c. 179).

any other person, for the sale or disposition of the whole or any part of such merchandise, for any money advanced, or negotiable instrument or other obligation in writing given by such other person upon the faith thereof.

§ 4. Every person who shall hereafter accept or take any such merchandise in deposit for any such agent, as a security for any antecedent debt or demand, shall not acquire thereby, or enforce any right or interest in or to such merchandise or document, other than was possessed or might have been enforced by such agent at the time of such deposit.

§ 5. Nothing contained in the two last preceding sections of this act, shall be construed to prevent the true owner of any merchandise so deposited, from demanding or receiving the same, upon repayment of the money advanced, or on restoration of the security given, on the deposit of such merchandise, and upon satisfying such lien as may exist thereon in favor of the agent who may have deposited the same; nor from recovering any balance which may remain in the hands of the person with whom such merchandise shall have been deposited, as the produce of the sale thereof, after satisfying the amount justly due to such person by reason of such deposit.

§ 6. Nothing contained in this Act shall authorize a common carrier, warehouse-keeper, or other person to whom merchandise or other property may be committed for transportation or storage only, to sell or hypothecate the same.

§ 7. [Repealed by L. 1886, ch. 593.]

§ 8. Nothing contained in the last preceding section, shall be construed to prevent the Court of Chancery from compelling discovery, or granting relief upon any bill to be filed in that court by the owner of any merchandise so intrusted or consigned, against the factor or agent by whom such merchandise shall have been applied or sold contrary to the provisions of the said section, or against any person who shall have been knowingly a party to such fraudulent application or sale thereof; but no answer to any such bill shall be read in evidence against the defendant making the same, on the trial of any indictment for the fraud charged in the bill.

ENGLISH FACTORS ACT, 1889.

52 & 53 Vict. c. 45.

An Act to Amend and Consolidate the Factors Acts.
[26th August, 1889.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows : —

Preliminary.

1. For the Purposes of this Act — (1) The expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods: (2) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf: (3) The expression "goods" shall include wares and merchandise: (4) The expression "document of title" shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented: (5) The expression "pledge" shall include any contract pledging, or giving lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability: (6) The expression "person" shall include any body of persons corporate or unincorporate.

Disposition by Mercantile Agents.

2. — (1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made

by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not the authority to make the same. (2) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined. (3) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be the consent of the owner. (4) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

3. A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

4. Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

5. The consideration necessary for the validity of a sale, pledge, or other disposition, of goods, in pursuance of this Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange.

6. For the purposes of this Act an agreement made with a

mercantile agent through a clerk or other person authorized in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent.

7. — (1) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person. (2) Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition by a mercantile agent.

Dispositions by Sellers and Buyers of Goods.

8. Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

9. Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

10. Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the docu-

ment in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage in transitu as a transfer of a bill of lading has for defeating the right of stoppage in transitu.

Supplemental.

11. For the purposes of this Act, the transfer of a document may be by endorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery.

12. — (1) Nothing in this Act shall authorize an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing. (2) Nothing in this Act shall prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien. (3) Nothing in this Act shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set-off on the part of the buyer against the agent.

13. The provisions of this Act shall be construed in amplification and not in derogation of the powers exercisable by an agent independently of this Act.

14. The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act, but this repeal shall not affect any right acquired or liability incurred before the commencement of this Act under any enactment hereby repealed.[1]

[1] Repeals 4 Geo. IV. c. 83; 6 Geo. IV. c. 94; 5 & 6 Vict. c. 39; 40 & 41 Vict. c. 39.

15. This Act shall commence and come into operation on the first day of January one thousand eight hundred and ninety.

16. This Act shall not extend to Scotland.[1]

17. This Act may be cited as the Factors Act, 1889.

MASSACHUSETTS EMPLOYERS' LIABILITY ACT OF 1887, WITH AMENDMENTS TO JANUARY 1, 1901.

STATUTE 1887, ch. 270.

An Act to extend and regulate the liability of employers to make compensation for personal injuries suffered by employees in their service.

§ 1. Where, after the passage of this Act, personal injury is caused to an employee who is himself in the exercise of due care and diligence at the time, —

(1.) By reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer, which arose from or had not been discovered or remedied owing to, the negligence of the employer, or of any person in the service of the employer and intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition; or

(2.) By reason of the negligence of any person in the service of the employer, intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence, or, in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer;[2] or

(3.) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive engine, or train upon a railroad, —

the employee, or, in case the injury results in death, the legal representatives of such employee, shall have the same right of compensation and remedies against the employer as if the em-

[1] Extended to Scotland, with slight modifications, by 53 & 54 Vict. c. 40.

[2] As amended St. 1894, c. 499.

ployee had not been an employee of nor in the service of the employer, nor engaged in its work.

And in case such death is not instantaneous, or is preceded by conscious suffering, said legal representatives may in the action brought under this section, except as hereinafter provided, also recover damages for such death. The total damages awarded hereunder, both for said death and said injury, shall not exceed five thousand dollars, and shall be apportioned by the jury between the legal representatives and the persons, if any, entitled, under the succeeding section of this Act, to bring an action for instantaneous death. If there are no such persons, then no damages for such death shall be recovered, and the damages, so far as the same are awarded for said death, shall be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable.[1]

A car in use by or in the possession of a railroad company shall be considered a part of the ways, or machinery of the company using or having the same in possession, within the meaning of this Act, whether such car is owned by it or by some other company or person.[2]

One or more cars in motion, whether attached to an engine or not, shall constitute a train within the meaning of this Act.[3]

Any person who, as a part of his duty for the time being, physically controls or directs the movements of a signal, switch or train shall be deemed to be a person in charge or control of a signal, switch or train within the meaning of this Act.[3]

§ 2. Where an employee is instantly killed, or dies without conscious suffering, as the result of the negligence of an employer, or of the negligence of any person for whose negligence the employer is liable under the provisions of this Act, the widow of the deceased, or, in case there is no widow the next of kin, provided that such next of kin were at the time of the death of such employee dependent upon the wages of such employee for support, may maintain an action for damages therefor, and may recover in the same manner, to the same extent, as if the death of the deceased had not been instantaneous, or as if the deceased had consciously suffered.

[1] This paragraph was added by St. 1892, c. 260.
[2] This paragraph was added by St. 1893, c. 359.
[3] This paragraph was added by St. 1897, c. 491.

§ 3. Except in actions brought by the personal representatives under section one of this Act to recover damages for both the injury and death of an employee, the amount of compensation receivable under this Act in cases of personal injury shall not exceed the sum of four thousand dollars. In case of death which follows instantaneously or without conscious suffering, compensation in lieu thereof may be recovered in not less than five hundred and not more than five thousand dollars, to be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable; and no action for the recovery of compensation for injury or death under this Act shall be maintained, unless notice of the time, place, and cause of the injury is given to the employer within sixty days, and the action is commenced within one year, from the occurrence of the accident causing the injury or death. The notice required by this section shall be in writing, signed by the person injured or by some one in his behalf; but if from physical or mental incapacity it is impossible for the person injured to give the notice within the time provided in said section, he may give the same within ten days after such incapacity is removed, and in case of his death without having given the notice and without having been for ten days at any time after his injury of sufficient capacity to give the notice, his executor or administrator may give such notice within sixty days after his appointment. But no notice given under the provisions of this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place or cause of the injury: provided, it is shown that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby.[1]

§ 4. Whenever an employer enters into a contract, either written or verbal, with an independent contractor to do part of such employer's work or whenever such contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or sub-contract shall not bar the liability of the employer for injuries to the employees of such contractor or sub-contractor, by reason of any defect in the condition of the ways, works, machinery, or plant, if they are the property of the employer, or furnished by him, and if such defect arose, or had not been dis-

[1] As amended and re-enacted by St. 1900, c. 446.

covered or remedied, through the negligence of the employer, or of some person intrusted by him with the duty of seeing that they were in proper condition.

§ 5. An employee or his legal representatives shall not be entitled under this Act to any right of compensation or remedy against his employer in any case where such employee knew of the defect or negligence which caused the injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer, who had intrusted to him some general superintendence.

§ 6. Any employer who shall have contributed to an insurance fund created and maintained for the mutual purpose of indemnifying an employee for personal injuries for which compensation may be recovered under this Act, or to any relief society formed under chapter two hundred and forty-four of the Acts of the year eighteen hundred and eighty-two, as authorized by chapter one hundred and twenty-five of the Acts of the year eighteen hundred and eighty-six, may prove, in mitigation of the damages recoverable by an employee under this Act, such proportion of the pecuniary benefit which has been received by such employee from any such fund or society, on account of such contribution of said employer, as the contribution of such employer to such fund or society bears to the whole contribution thereto.

§ 7. This Act shall not apply to injuries caused to domestic servants or farm laborers by other fellow-employees, and shall take effect on the first day of September, eighteen hundred and eighty-seven.

INDEX.

INDEX.

Page

Abandonment:
of agency by agent 82
See RENUNCIATION.

Acceptance of Bill:
liability of agent 246

Accounting:
as duty of agent 112–115
keeping accounts 113
rendering accounts 113
set-off 114
delivery of funds 114
agent not to deny principal's title 112

Acquiescence:
ratification by 48–50

Action:
as evidence of ratification 48
auctioneer may bring, when 153, 262
by and against undisclosed principal 158–177
to recover money paid by mistake or fraud 214–215
in equity 225
against agent 230–249, 255–257
against agent or principal 249–253
against third person by agent 257–262

Admissions of Agent:
cannot prove agency 178
when admissible against principal 180–184
when inadmissible 178, 185

Adverse Interest:
agent not to assume 34, 110–112
renders admissions incompetent 185

Agency:
general signification . . . . . 5–6, 10 *n*, 14
distinguished from other relations 6–10, 120–121
division of subject 10, 21–22
formation of 23–76
by agreement 24–41

Page

Agency — *continued.*
by contract 24–39
by gratuitous assent 40–41
by ratification 42–61
by estoppel 62–71
by necessity 72–76
termination of 77–90
by agreement 77–78
by revocation 78–82, 96–99
by renunciation 82, 100
by operation of law 82–87
by change of law 83
by change in subject-matter 83
by death 84
by insanity 84
by illness 85
by marriage 85
by constraint of law 85
by bankruptcy 86
by war 86
irrevocable agencies 87–90
unlawful interference with 224, 267

Agent:
definition 17, 18
distinguished from servant 10–17
classification 19–21
general and special agents 19–21, 132–134
competency of 34
joint-agents 35
sub-agents 36, 115–120
gratuitous agents 40, 122–125
renunciation of agency 82, 100
death of, insanity, illness, etc. 84–86
irrevocable interest in agency 87–90
compensation of 92–103
reimbursement of 103
indemnity to 104
obligations to principal 106–125
rights against principal 92–105
public agent 134, 254
obligations to third parties 229–253, 263–267
rights against third parties 257–262, 267
really the principal 259

Agreement:
formation of agency by 24–41
termination of agency by 77–78

Alien:
Page
as principal 33, 86

Apparent Authority:
doctrine of 15, 17, 65–68, 128–132
of general and special agents 132–134
of public agents 134
elements of 135–140
illustrations of 140–147
of servant 301

Apparent Ownership. *See* INDICIA OF OWNERSHIP.

Assault:
liability of master for servant's 307

Assignment:
of contract of service 10
of rights and obligations of principal 105
of obligations of agent 115–120
of obligations generally 158

Association. *See* VOLUNTARY SOCIETIES.

Assumption of Risk:
by servant 352

Attorneys at Law:
powers and duties as agents 154

Auctioneers:
powers and duties as agents 153

Authority of Agent:
how conferred 5, 23, 26
how terminated 77
apparent authority 128–132
general and special agents 132–134
public agents 134
elements of 135–140
illustrations 140–147
in particular agencies 148–157

Bailment:
distinguished from agency 8

Bank:
liability for collection of paper 119
gratuitous directors 124
rights and liabilities on paper signed by cashier 242, 243, 245, 248
See CASHIER.

Bankruptcy:
effect on agency 86

Page

Bill of Lading:
issue of fictitious 206

Brokers:
powers and duties as agent 151

Carrier:
liability to passenger for servant's wilful torts 310

Cashier of Bank:
powers and duties as agent 155
signing negotiable instruments 242, 243, 245, 248

Charities:
liability for torts of agents and servants 318

Clubs. *See* VOLUNTARY SOCIETIES.

Collection Agent:
powers of 144

Compensation of Agent or Servant:
how fixed 92–94
how secured 94–95
for unauthorized act 95
conditional 95–96
upon revocation of agency 96–99
upon renunciation of agency 100
when acting for both parties 101
for illegal services 102

Compulsory Employment or Service:
meaning 286
liability of master for servant compulsorily employed 286
status of one compelled to serve 288
parent and child 289
husband and wife 289

Conductor:
agent or servant 18
agent by necessity 75

Consideration:
in contract of agency 26

Constituent:
generic term 5
includes principal and master 5–6

Contract:
object of agency to create 12
agency by 24–39
by agent for disclosed principal 127–157
by agent for undisclosed principal 158–177
privity of 158–165
inducing breach of 209, 224, 267, 370

Contract — *continued.*
Page
inducing termination, without breach 209, 224
interference with, generally 372–373
liability of agent on 250

Contractor, Independent:
distinguished from agent 9

Contributory Negligence:
of servant 356

Conversion:
liability of third person to principal for 216
liability of agent to third person for 264–266

Convict:
whether a fellow-servant 288

Corporations:
as principals 31
executing specialty 38
ratification by 44, 234
notice to agent of 190
municipal, liability for act of agent 316

County:
liability for torts of officers 315

Course of the Employment:
distinguished from scope of the authority 195
basis of master's liability 298
in case of wilful torts 305

Crimes of Servants:
liability of master for 323
absolute liability 324
authority to commit 327
negligent failure to control 328

Custom:
authority implied from 138–140
effect on liability of agent 252

Damages:
for revocation of agency 96–98
for remuneration of agency 100–101
for disobedience or negligence of agent 106–109, 117
for breach of warranty of authority 232
exemplary, liability of master for 313
See LIABILITY; OBLIGATION.

Death:
terminates agency 84
effect on contracts 253

Page

Deceit:
an anomalous tort . . . . . 4 *n*, 12, 13
liability of principal for agent's 68, 197–200
liability of third person 223, 267
liability of agent 232, 264
See FRAUD.

Declarations of Agent:
whether admissible against principal 178–185

Deed. *See* SEALED INSTRUMENTS.

Defamation:
liability of principal for agent's 209, 309
liability of master to servant for 357

Del credere Agency:
definition 21
distinguished from sale 7
nature of liability 120–122

Delegation of Duties by Agent:
sub-agents 36
no assignment of obligations 115–120
delegation of duties 116–117
authorized appointment of sub-agents 118–120
See SUB-SERVANTS.

Dissolution of Agency:
forms of 77–90

Divisible Contract:
whether contract of service is 100

Documents of Title. *See* INDICIA OF OWNERSHIP.

Duties. *See* LIABILITIES; OBLIGATION.

Election:
to ratify or disaffirm 59
to hold agent or principal 169

Employers' Liability Acts:
provisions of 345, 381–384

Enticing away Servant:
liability for 370

Estoppel:
basis of principal's liability 13–15, 17
agency by 62–71
meaning of 62–64
relied upon to establish agency 65
relied upon to establish extent of agency 66, 128–135
application to torts 68, 195, 197–211, 296

Estoppel — *continued.*
Page
to deny ownership 217–222
to deny that agent is principal 174
limits of doctrine 70–71

Evidence:
to show that agent is acting for undisclosed principal . . . 164
to vary written instrument 176, 250–252
of agent to establish agency 179
admissions of agent as 178–185

Execution of Instruments:
sealed instruments 37, 170, 237
negotiable instruments 238–249
under statute of frauds 37
simple contracts 250, 254

Factors:
powers and liabilities of 149

Factors Acts:
provisions and effect of 147, 219–222, 375–381

False Arrest:
by agent, liability of principal 210
by servant, liability of master 308

False Representations:
by agent as to authority 230–233
by agent for principal 197–208

Fellow-Servants:
the fellow-servant rule 331
evolution of the rule 332
who are 335
vice-principal 338
superior-officer test 339
non-assignable duty test 340
summary 344
incompetent 344
liability of one, to another 361
liability of one, for another's torts 365

Fictitious Principals:
no ratification 44
liability of agent 233

Foreign Principal:
liability of 170, 213
liability of agent of 236

Forgery:
ratification of 58

Form: Page
of appointment of agent 36
of ratification of contract 55
See SEAL; STATUTE OF FRAUDS; EXECUTION OF INSTRUMENTS.

Fraud:
of agent on principal 110, 148
of agent on third person 197–208, 232, 264
for benefit of principal 200
for benefit of agent 202
of third person on principal 215, 223

Frauds, Statute of. *See* STATUTE OF FRAUDS.

Gambling Contracts:
employment to make illegal 39, 102

General Agent:
distinguished from special agent 19–21, 132–134
whether distinction of any value 20
authority of 132–134

Good Faith:
as duty of agent 110–112

Gratuitous Agents:
liability of principal 40
liability of agent to principal 40, 122–125, 360

Holding out:
works an estoppel against principal 15, 64, 130, 195
See ESTOPPEL.

Husband and Wife:
liability of husband for necessaries furnished wife 72
liability for torts of wife 289

Identity:
fiction of 5, 14
as applicable to notice 186–192
as applicable to undisclosed principals 161

Illegality. *See* LEGALITY OF CONTRACT.

Illness or Incapacity:
terminates agency 85

Impossibility:
discharge of agency by 82–87
change in law 83
change in subject-matter 83
death, insanity, war, etc. 84–87

Incompetency. *See* PARTIES.

Indemnity:
Page
to agent by principal 104
Independent Contractor:
distinguished from servant 9, 274
employer not liable for torts of 274
exceptions to rule:
selecting competent contractor 275
contracting for nuisance 275
contracting for unsafe result 276
statutory requirements 276
contract liability to do work safely 277
extra-hazardous work 277
safety of premises 278
interference by employer 278
resumption of control by employer 279
Indicia of Ownership:
principal conferring on agent 8, 174, 217
Infants:
as principals 27
as agents 34, 74
ratification by 53–55
Insanity. *See* LUNATICS.
Insurance Agent:
general powers of 143
Irrevocable Agencies:
power coupled with an interest 88
power coupled with an obligation 89

Joint Parties:
as principals 33
as agents 35
Joint Tort-feasors:
principal and agent as 266
Judgment:
as evidence of an election 169

Knowledge:
of agent as notice to principal 186

Lease:
distinguished from agency 8
Legality of Contract:
agency for illegal objects 39
ratification of illegal act 56–59

Legality of Contract — *continued.* Page
subsequent illegality 83
compensation 102, 104

Liability:
basis of principal's or master's 13–17
of principal to agent 92–105
of agent to principal 106–125
of principal to third party 127–211
of third party to principal 212–227
of agent to third party 229–257, 263–267
of third party to agent 257–262, 267
of master for torts of servants 295–321
of master to servant . . . . . 330 *et seq.*

Libel:
by agent or servant 209, 309, 328

Lien:
of agent for compensation 94

Lunatics:
as principals 28–30
as agents 34
insanity terminates agency 84

Manager of business:
powers of 142

Marriage:
effect on agency 85

Married Women:
as principals 30, 38, 85
as agents 34

See HUSBAND AND WIFE.

Master:
distinguished from principal 10–17
basis of liability for tort of servant 13–17, 194
conditions of liability for torts of servant 295
wrongdoer must be defendant's servant 295
servant must be about master's business 297
servant must be acting within course of the employment . 298
acts commanded 299
acts ratified 300
acts master leads servant reasonably to believe authorized 301
acts impliedly authorized 302
acts for master's benefit 304
acts for servant's benefit 305
wilful or malicious torts 305

Master — *continued.*

Page

in furtherance of employment 305
wilful injuries to passengers 310
misuse of dangerous instrumentalities 311
liability for exemplary damages 313
imputed notice to 314
liability for penalties 322
liability for crimes of servant 323
absolute liability 324
authorized acts 327
negligent failure to control 328
liability for injuries to one servant by another 330
classification of servants 330
fellow-servant rule 331
statement of 331
evolution of 332
common service 335
vice-principal doctrine 338
superior officer test 339
non-assignable duty test 340
summary 344
incompetent fellow-servants 344
employers' liability acts 345
liability to servant for his own torts 350
negligent operative act 350
negligent performance of non-assignable duties 351
assumption of risk by servant 352
contributory negligence of servant 356
wilful torts to servants 357
action against third person 368
for personal injury to servant 368
for seduction of servant 369
for enticing away servant 370

Master and Servant:
law of, distinguished from law of principal and agent . . . 10–17
See MASTER; SERVANT.

Misrepresentation:
liability of principal for agent's 62–71, 197–211
liability of agent for, as to authority 230–233
See ESTOPPEL.

Mistake:
effect of, on ratification 51
money paid under 255

Municipal Corporations:
liability for torts of officers 316

Page

Necessity:
agency by 72–76
agency of wife 72–74
agency of infant child 74
agency of shipmaster 74
agency of unpaid vendor 75
agency of conductors, drivers, etc. 75–76

Negligence:
of agent generally 108, 360
of gratuitous agent 122–125, 360
of agent toward third parties 263
See TORTS.

Negotiable Instruments:
agent authorized to execute 146
parties cannot be introduced into by parol 165, 171, 176
title to, when diverted by agent 147, 216
liability of agent who signs 238–249
signature to, construction 241–247
indorsement of 247

Non-assignable Duties:
doctrine of master's 340, 351

Non-feasance:
liability of agent for 263, 362

Notice:
ratification of unauthorized 57
of termination of agency 58, 60, 62, 80, 81
to agent, when binding on principal 186–192
imputed to master 314

Nuisance:
contracting for 275
criminal liability of master 328

Obedience:
as duty of agent 106–108

Obligation:
incurred by representation 4
primary antecedent 3, 10, 11, 15, 193
secondary substituted 3, 11, 16, 193
resting on assent 24–61
created by estoppel 62–71
created by necessity 72–76
of principal to agent 92–105
non-assignability 105, 115–120, 158
of agent to principal 106–125
of principal to third party 127–211
of third party to principal 212–227

Obligation — *continued.*
Page
of agent to third party 229–257, 263–267
of third party to agent 257–262, 267
See LIABILITY.
Officers. *See* PUBLIC AGENTS; SUPERIOR OFFICERS.
Ostensible Authority:
test of principal's liability 15, 17, 65–68, 128–147, 218
meaning 129
See APPARENT AUTHORITY.
Ostensible Ownership:
conferred on agent works estoppel 8, 217–222
Ownership. *See* INDICIA OF OWNERSHIP.

Parent and Child:
liability of parent for necessaries furnished child 74
liability of parent for torts of child 289
Parol Evidence:
to introduce undisclosed principal into a contract . . 164, 176, 250
to explain ambiguity 239
Parties to Contract of Agency:
competency of 27–36
infants 27, 34
insane 28
married women 30
corporations 31
partnerships 32
clubs, etc. 32
aliens 33
joint parties 33, 35
Partnership:
distinguished from agency 7
as principal 32
as agent 35
executing specialty 38
Passengers:
liability of carrier for wilful injuries to 310
Payment:
authority of agent to receive 138, 140, 144, 150, 153
Penalties:
liability of master to, for acts of servant 322
Physician:
engaged by servant 75
whether a servant 284
Pilot:
whether a servant 286

Page

Pledge:
of principal's goods by agent 141, 150–151, 152, 219–222

Power coupled with an Interest:
meaning of phrase 88

Power coupled with an Obligation:
meaning of phrase 89

Power of Attorney:
how construed 135

Powers of Agent. *See* AUTHORITY OF AGENT.

Principal:
distinguished from master 10–17
basis of liability 13–17
competency of 27–33, 53
joint-principals 33
gratuitous 40
ratification by 42–61
estoppel of 62–71
by necessity 72–76
renunciation by 78–81
death, insanity, etc. of 84–87
obligations to agents 92–105
cannot assign rights or obligations 105
rights against agent 106–125
liabilities to third persons 127–211
bound by admissions of agent 178–185
bound by notice to agent 186–192
rights against third parties 212–227

Privity of Contract:
between sub-agent and principal 115–120
between third party and undisclosed principal 158–165

Promoters:
ratification of contracts of 44, 233–234

Prudence:
as duty of agent 108

Public Agents:
several or joint 36
authority of 134
liability of 254, 366

Public Principal:
liability on agent's contracts 134
liability for servant's torts 315
liability of state and its agencies 315
liability of municipal corporations 316
liability of public officers 317

Public Principal — *continued.*
Page
liability of public charities 318
liability of private person served by public officer 321
Purchase:
agent authorized to 141

Quasi-contract:
in recovering for necessaries 73
liability of third person in 214–216, 262
liability of agent in 255–257

Ratification:
meaning 42
elements of 43–59
existing principal necessary 44
act done professedly for principal 44–45
assent of principal 46
by conduct 48
by silence 49
must be *in toto* 50
must be free from mistake or fraud 50
has third party right to recede ? 52
competency of principal 53
form of ratification 55
legality of act ratified 56
of forgery 58
of notice of intent 57
of void act 58
of torts 300
legal effects of 59–61
is irrevocable 59
as between principal and third party 59
as between principal and strangers 60
as between principal and agent 60, 95
as between agent and third party 61
Reimbursement of Agent:
liability of principal 103
Remedies:
of agent against principal 94, 96
of principal against agent 112–115
of principal against third party 222, 225
of third party against agent . . . . . 229 *et seq.*
of agent against third party 258–262
of third parties against principal for agent's misrepresentations 196
Renunciation of Agency:
when possible 82

Renunciation of Agency — *continued.* Page
notice of 82
effect of 82, 100

Representation (Agency):
meaning of . . . . . 3–5, 10 *n.*
basis of doctrines of 11
kinds of 5
principal and agent 17
master and servant 17
distinction between 10–13

Representative:
generic term 5
includes agent and servant 5

Res gestae:
meaning and application 180

Revocation of Agency:
when possible 78
what amounts to 79
notice of 80
effect of 81, 96
when impossible 87–90
See TERMINATION OF AGENCY.

Sale:
distinguished from agency 7
authority of agent to make 140
by factors 149, 219
by brokers 151
by auctioneer 153
by shipmaster 156
recovery of property sold without authority 216–222

Scope of Authority: *See* AUTHORITY; APPARENT AUTHORITY.

Seal:
when necessary 37, 55

Sealed Instruments:
authority to execute 37, 55
authority to fill blanks in 38
parties cannot be introduced into by parol 170, 176, 258
liability of agent who signs 237
construction of signatures 170, 237

Seduction:
of servant 369

Servant:
definition 17, 18, 271
distinguished from agent 10–17

Servant — *continued.*

Page

may be also agent 18
classification 21, 330
who is and who is not a 273, 295
independent contractor 274
transfer of service 280
compulsory employment 286
sub-servants 291
volunteers 292
liability of master for torts of 295
liability of public master for torts of 315
liability of public charity for torts of 318
liability of private person served by public officer 321
liability of master for crimes of 322
liability of master to one servant for torts of a fellow-servant . 330
fellow-servants 331
vice-principals 338
superior officers 339
master's non-assignable duties to 341
incompetent, master's liability for 344
rights under employers' liability acts 345
master's liability to, for his own torts 350, 357
assumption of risk by 352
contributory negligence of 356
liability of servant for his torts 359
liability to master 360
liability to fellow-servant 361
liability to third persons 362
non-feasance 362
misfeasance 365
liability for torts of fellow-servants 365
liability of third person for torts to 367
personal injuries to 368
seduction of 369
enticing away 370
procuring discharge of 372

Set-off:
by agent 114
to agent 174

Shipmaster:
agency of 74
powers 156

Silence:
whether a form of ratification 49

Special Agent:
definition 19

Special Agents — *continued.* Page
distinguished from general agent 19–21, 132
whether distinction of any value 19–20
authority of 132–134

State:
liability for torts of officers 315
acts of, as a defence 366

Statute of Frauds:
agency for more than a year 36
agent authorized in writing 37
ratification 56
parol evidence rule 165

Sub-agent:
how appointed 36
power of agent to appoint 115–120
notice to 191
torts of 291

Sub-servants:
whether master liable for acts of 291
See SUB-AGENT.

Superior Officer:
whether a vice-principal 339

Termination of Agency:
forms of 77–90
See AGENCY.

Title to Property:
agent not to deny principal's 112
when sold without authority 216–222

Torts:
of agent, liability of principal for 16–17, 193–211
ratification of 56–59, 194
liability of third person to principal for 216–222
liability of agent to third person for 263–267
joint liability of agent and principal 266
liability of third person to agent for 267
chief subject-matter of law of master and servant 12, 271
liability of master for servant's 16–17, 194, 295
liability of public agencies for servant's 315
liability of master to one servant for another servant's . . . 330
liability of master to servant for his own 350
liability of servant for his own 359
liability of third person for 367
See MASTER; SERVANT.

Transfer of Service:
Page
general rule 10, 280
hiring horses and driver 280
hiring machine and operator 283
servant sent to work on another's premises 284
physicians employed to treat servants or passengers 284
sleeping car porters 285
Trust Funds:
following trust funds 225
Trusts:
distinguished from agency 7
constructive 225
following trust funds 225

Unauthorized Acts:
basis of principal's liability for 14–17, 66, 128–132
ratification of 42–61
compensation for 95
liability of agent to third party 230–233
Undisclosed Principal:
general doctrines 158–165
liability of 162, 166–172
rights of 164, 172–177
liability of agent of 249
Usage. *See* CUSTOM.

Vendor:
agency of unpaid 75
Vice-Principal:
doctrine of 338
test as to who is 338
superior officer test 339
non-assignable duty test 340
summary 344
Voluntary Societies:
as principals 32, 234
liability of agent of 234
Volunteer:
whether his acts render involuntary master liable 292
whether he may recover for injury occasioned by a servant . . 292

War:
effect on agency 33, 86
Warranty:
authority of agent to give 141
authority of factor to give 150

Warranty — *continued.*
Page
authority of broker to give 152
authority of auctioneer to give 153
Warranty of Authority:
liability of agent on 231, 254
Wife:
agency of 5, 72–74
as principal 30
See MARRIED WOMEN.
Wilful Torts:
liability of master for servant's 305, 310, 311
liability of master to servant for 357
to servant 368

T. J. MULCAHY
Captain, Q.M.C.
Assistant